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THE lynching in New Orleans, following the verdict of the jury in the trial of the Italians accused of the murder of the Chief of Police of that city, arose from very natural indignation over the prospect that the murderers would not be punished by law. The murder was as foul and dastardly as any in the annals of crime. Upon the conviction of the murderers seemed to rest all future hope of punishing crime, and of destroying that monster of lawlessness which for a long time had justice by the throat—the "Mafia." There seemed to be no reasonable doubt as to the identity of the murderers. It was with deep and well grounded indignation that the people of that city heard that the jury had disagreed in the case of several of the alleged murderers, and had acquitted others. The feeling was the more intense, owing to the general belief that the verdict was partly the result of barter, negotiated by friends of the accused, and partly fear of personal violence by the jurors, should they pronounce a judgment of guilt. The result, as every one knows, was the slaughter of eleven unarmed men, under the protection of the law. While it is only fair and right that the nature of the provocation should be considered, and that due allowance should be made for the sense of wrong under which the violence was committed, we cannot but think that the citizens of New Orleans, who participated in the acts of the mob, have made an awful mistake. That courts have in the past, as doubtless in this case, failed to administer justice, is conceded. That in the history of the world there are many instances as perhaps was this, where mobs have been abstractly right, and where justice, long set at defiance, has been effectually redressed by the people, can not be denied. At times it seems necessary for the people to take into their own hands the enforcement of the law. When verdicts are rendered that insult the common feeling of justice, a community may almost be pardoned for trying to correct the wrong in such manner as shall seem to it most appropriate and effectual. And if lynching is in any case excusable, it was so in this. But the harm done in cases of this character is not the actual lynching, but in the countenance and support indirectly given to the idea that in any case a resort to mob violence is justifiable. There is no telling in what direction or to what extremes such a doctrine may lead. The moment unauthorized members of a community attempt to take the award of justice into their own hands, that moment do they breed elements of lawlessness and injustice. If these lynchers are justified in their acts, and may set themselves up as the arbiters of justice, who can consistently deny the same right to other mobs? If the courts are useless, if legal trials are to count for naught, if mob rule is to prevail, what limit can be placed upon its jurisdiction or its acts, and who is to place it? For on the day when mob rule takes the place of ousted judges and sits supreme upon the bench, the sham and undefined justice of the mob begins, and anarchy will prevail.

QUESTIONS have frequently arisen in the courts, as to the right to the use, in business, of one's own name, where the owner has theretofore sold it in connection with an established business as a trade name; but a novel question of this character has recently arisen in New York, involving the right of the writer of a book to use her own name, where that name happens to be that of an author of established reputation. Mrs. Mary J. Holmes, wife of a citizen of Connecticut, has written a novel, the publication of which, it is said, has been retarded by reason of threatened prosecution on the part of the publisher of the novels of the well known Mary J. Holmes, for infringement of copyright. Whether the better known Mary J. Holmes has property in her name as a trade-mark, or whether it is part of her copyright, like the title of a book, so that the new Mary J. Holmes cannot use her own lawful name on her title page, is the question. An exchange suggests that inasmuch as Mrs. Holmes No. 1 is Mary Jane, the new Mrs. Holmes might avoid the difficulty by calling herself Mary Josephine. Legally speaking, it certainly is maintainable that, leaving out of view the question of estoppel arising from a previous sale, any one has a

clear right to use his or her own lawful name in any manner he or she may choose. Looking at the matter, however, from a purely literary stand-point, and bearing in mind the character of the novels in controversy, it would be something of a question to determine which of the two authors above named would be most seriously damaged.

Two recent publications which came to us about the same time, and which have interested us greatly, serve to give one a better idea of the United States Supreme Court—its scope, history, influence and *personnel*, than can be found in books generally. We refer to the *brochure* on the Supreme Court of the United States—its history and influence in our constitutional system, by Westel W. Willoughby, of Johns Hopkins University, and to a modest pamphlet on the organization and judges of that court, to the year 1835, by Joseph Cox, of Cincinnati. The first named is, of course, the more philosophic in its treatment, giving us in detail the origin of the federal court—its establishment and jurisdiction, its relations to congress, the executive, State legislatures and judiciaries, and its present condition and needs, while the essay of Mr. Cox is a history of the members of that court, from its organization till the death of Chief Justice Marshall in 1835. It is full of interesting bits of gossip and personal history, the effect of which is to destroy, in some measure, our awe and reverence for the early expounders of the law, and to impress us with the belief that in those days judges were as human as now.

NOTES OF RECENT DECISIONS.

TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—DAMAGES—MENTAL SUFFERING.—The authorities upon the question of mental suffering as an element of damage for delay in delivering a telegram, are succinctly reviewed in Chase v. West. Union Tel. Co., 44 Fed. Rep. 554, decided by the United States Circuit Court, N. D. Georgia. The court, in holding against the recovery of such damages alone, unaccompanied with other injury, says:

In the case of Relle v. Telegraph Co., 55 Tex. 308, it was held that "a telegraph company is liable for an injury to the feelings of a son by the willful neglect to deliver to him a message announcing the death of his mother, whereby he was prevented from attending her funeral." But in the subsequent case of Railway Co. v. Levy, 59 Tex. 563, this opinion was overruled, and the court held as follows: "The plaintiff sued a telegraph company for delay in delivering to him a message announcing the death of his son's wife and child, whereby he was prevented from attending the funeral. *Held*, that there could be no recovery for his mental suffering." The case of Relle v. Telegraph Co., *supra*, was referred to, and the court say "that it cannot be sustained upon principle, nor upon the authority of adjudicated cases." There are later cases in Texas on this subject, but I understand them to be in harmony with the case last cited.

In the case of Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. Rep. 574, this question was considered, and the majority of the court held that damages for mental suffering may be recovered. Lurton, J., with whom Folkes, J., concurred, dissented, saying "that an action for injury to the feelings, or fright or grief, or other mental injury, cannot be sustained as an independent ground of action." It appears that there are statutes in Tennessee requiring telegraph companies to deliver telegraphic messages "correctly, and without unreasonable delay;" and for a failure to do so the defaulting company is declared to be "liable in damages to the party aggrieved." Caldwell, J., who delivered the opinion of the court, lays some stress on this statute, and Turney, C. J., in a concurring opinion, rests his concurrence primarily upon this statute; holding that it covers all messages, and makes no distinction as to the character of messages. So that in this case a bare majority sustained the right of action for damages of this sort, and the right rested largely upon the statutes of the State.

I have found no other case that goes to this extent, nor has any such case been cited. On the contrary, quite an array of authorities deny the right to recover for damages of this character. Russell v. Telegraph Co. (Dak.), 19 N. W. Rep. 408; West v. Telegraph Co., 39 Kan. 93, 17 Pac. Rep. 807; Railway Co. v. Levy, 59 Tex. 542, 563; Wyman v. Leavitt, 71 Me. 227; Johnson v. Wells, 6 Nev. 224; Nagel v. Railway Co., 75 Mo. 653; Railway Co. v. Stables, 62 Ill. 313; Freese v. Tripp, 70 Ill. 503; Meidel v. Anthis, 71 Ill. 241; Joch v. Dankwardt, 85 Ill. 333; Porter v. Railway Co., 71 Mo. 83; Fenelon v. Butts, 53 Wis. 344, 10 N. W. Rep. 501; Ferguson v. Davis Co., 57 Iowa, 601, 10 N. W. Rep. 906; Stewart v. Ripon, 38 Wis. 584; Masters v. Warren, 27 Conn. 293; Blake v. Railway Co., 10 Eng. Law & Eq. 442; Lynch v. Knight, 9 H. L. Cas. 577; Burke v. Railway Co. 10 Cent. L. J. 48; Rowell v. Telegraph Co. (Tex.), 12 S. W. Rep. 534; Thompson v. Telegraph Co. (N. C.), 11 S. E. Rep. 269, 30 Amer. & Eng. Corp. Cas. 634.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE—PEDDLER'S LICENSE — SEWING MACHINE AGENTS.—The student of constitutional law will find in the case of State v. Ernest, 15 S. W. Rep. 81, decided by the Supreme Court of Missouri, an able exposition of the limitations upon the power of States, within the interstate commerce clause of the federal constitution to impose license tax upon peddlers. The conclusion reached is that,

Rev. St. Mo. § 7212, requiring all peddlers to pay a license fee, and § 7211, declaring that whoever sells certain classes of goods by going from place to place shall be deemed a peddler, is not a regulation of interstate commerce as applied to one who, as the agent of a manufacturer in another State, thus sells and delivers sewing-machines which have already been sent into the State. Macfarlane, J., thus states the general doctrine as laid down in the more important cases:

It is conceded by all that a law of a State which imposes a tax upon articles manufactured in or imported from another State, as a condition of the right to sell and dispose of them, would be in violation of this provision of the constitution. The difficulty, in each case, has been to determine the effect of the particular law under consideration; to determine whether, in that case, the commercial power of the federal government had ceased, and the power of the State had commenced. Solving these questions as they arose, it has been settled that it matters not whether the tax is imposed directly upon the commodity sold, or, by way of license exacted of the persons who make the sales, the restriction on commerce would be the same in either case. Welton v. Missouri, 91 U. S. 275; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592. By force of these decisions of the court having the highest judicial authority over the subject, it is settled that the sale of goods which are in another State at the time of the sale, for the purpose of introducing them into the State in which the regulation is made, is interstate commerce; that a tax on a sale of such goods before they are brought into the State is a tax on interstate commerce itself; that the imposition of a license tax upon the person making such sale is, in its effect, a tax upon the goods themselves; that a State cannot tax goods beyond its jurisdiction. Hynes v. Briggs, 41 Fed. Rep. 469, citing Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Woodruff v. Parkham, 8 Wall 123; Cook v. Pennsylvania, 97 U. S. 566; Welton v. Missouri, 91. U. S. 275. It has been equally well settled that as soon as goods are brought into a State, and have become a part of its general mass of property, it becomes taxable in the same manner as other similar property in the State. Brown v. Maryland, 12 Wheat. 419; Brown v Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Machine Co. v. Gage, 100 U. S. 676. The question of most difficulty is to determine, in individual cases, whether the property brought into one State from another has become a part of the general mass of the property of such State. The only rule yet laid down is that, so long as it remains in the original package in which it was brought into the State, it is beyond the control of State laws attempting to restrict or prohibit its sale. Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681. The rule is more elaborately stated by Chief Justice Marshall, in Brown v. Maryland, *supra*, who, after suggesting the difficulties that might arise in distinguishing between what would be laying a duty on imports and what would be the acknowledged power of States to tax persons and property within their territory, says: "Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that, when the importer has so acted upon the thing imported that it has become incorporated and mixed up with mass of property of the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution." The right of the State to require a license tax on certain avocations, and among them that of a peddler, is not questioned in this case, and has been recognized by the Supreme Court of the United States in many of the cases bearing on this question. Machine Co. Gage, 100 U. S. 676.

WILL—CONSTRUCTION—CONFLICT OF LAWS—CHARITABLE USE—VALIDITY.—The opinion of Judge Toney, of the Louisville Law and Equity Court, involving the construction of the will of the late Baroness Fahnenberg, who, in the disposition of her vast estate, ignored her kinsfolk and left most of her property in trust for certain charitable purposes, is of such interest, and so learned in its expositions of the law governing the validity of charitable trusts, as to demand at least passing notice—the length of the opinion precluding a full report. The will, after making some minor provisions, left to a trustee the balance of her estate, to be spent "in erecting, endowing and establishing an asylum for the good, welfare and benefit of young poor white Protestant children of poor old Protestant white men and of poor old Protestant white women—this asylum to be established in the city of Lexington, State of Kentucky, and to be called the Hunt-Grush Asylum. * * * The children and old men and old women to belong exclusively to the States of Kentucky, New Jersey and Maryland." The points in the decision are condensed in the following:

Some of the real estate in controversy being located in Missouri, one question was, what law should govern in the construction of the will. The court held that as to the real estate in Missouri, the *lex loci rei sitae*, the law of Missouri would govern; that as to the personalty devised, the *lex domicilii*, or law of the domicile, would govern, and that in seeking to establish and administer the trust in Kentucky, it was necessary to determine whether the charity sought to be established by the will of the Baroness would contravene any statute or public policy or common law of Kentucky. As to the law of Missouri, all the decisions of that State upon the subject were reviewed, which clearly showed that the charity under the law of that State was a valid one. The court then proceeded to consider whether the charity is such a one as a court of chancery in the State of Kentucky could uphold and enforce in the exercise of its inherent original jurisdiction, independent of any statute, and whether or not it is maintainable under the statute of

43 Elizabeth, and, also, under the statute of charitable uses and religious societies of Kentucky.

After reviewing at great length the English and American authorities, the judge took the ground that prior to the English statute of 43 Elizabeth, there was original equity jurisdiction in the English Court of Chancery to uphold and enforce such charities, and that the English statute of 43 Elizabeth was merely a declaratory statute creating no new law on the subject, but only a new machinery, and auxiliary jurisdiction for enforcing such charities, and that the diversity of doctrine among the American courts upon the subject of charitable uses and public charities arose alone from a misconception on the part of very many eminent American judges as to the origin of charities and chancery jurisdiction over them. He concluded that the will was valid under the 43 Elizabeth, which had been adopted in Kentucky and formed a part of the common law of the commonwealth from the organization of the State government down to 1851, when the English statute was formally repealed by an act of the Kentucky legislature, at which the present Kentucky statute of charitable uses and religious societies was substituted therefor. The decisions in Kentucky were reviewed to show that the charity would have have to be upheld, and that the present Kentucky statute of uses was even broader than its English predecessor, the statute of 43 Elizabeth. He cited Peynado v. Peynado, 82 Ky.; Leeds v. Shaw's Adm'r, 82 Ky.; Kinney v. Kinney, 86 Ky.; Cromie's Heirs v. Louisville, 3 Bush; Given's Adm'r v. Shouse, 5 Ky. Law Rep.; Penick v. Thomas, trustee, and Reynolds, Adm'r, v. Thomas, trustee, decided by the Court of Appeals of Kentucky, Dec. 6, 1890—all holding that charities similar to, if not identical with the charity created by the will of the Baroness, were valid and enforceable in Kentucky. It was also held that vagueness and uncertainty in the beneficiaries of the charity constituted no objection to its validity, but was an essential element in every public charity. The judge, however, seemed to be unwilling to be considered as indorsing the *morale* of such a charitable bequest, as it virtually ignored the natural claims of the relatives of the Baroness upon her bounty.

NEGOTIABLE INSTRUMENT — PROMISSORY NOTE—NEGOTIABILITY—STIPULATION TO PAY COST OF COLLECTING.—The question upon which the authorities have differed, whether a stipulation in note to pay costs for collecting, on failure to pay at maturity destroys its negotiability, was decided in the negative by the Supreme Court of Alabama in Montgomery v. Crossthwait, 8, South. Rep. 498. McClellan, J., says:

Upon no other question in the law, perhaps, are the authorities so irreconcilably, and at the same time so equally, divided, both in respect to the number of adjudged cases and the respectability of the courts upon either hand. The following cases maintain the commercial character of notes which embody the stipulation referred to: Stoneman v. Pyle, 35 Ind. 103; Pate v. Bank, 63 Ind. 254; Maxwell v. Morehart, 66 Ind. 301; Proctor v. Baldwin, 82 Ind. 370; Hubbard v. Harrison 38 Ind. 327; Heard v. Bank, 8 Neb. 10; Sperry v. Horr, 32 Iowa, 183; Nickerson v. Sheldon, 33 Ill. 373; Dietrich v. Bayhi, 23 La. Ann. 767; Gaar v. Banking Co., 11 Bush, 180; Sewing-Machine Co. v. Moreno, 7 Fed. Rep. 806; Seaton v. Scoville, 18 Kan. 435; Bank v. Sevier, 14 Fed. Rep. 671; Trader v. Chidester, 41 Ark. 242; Bank v. Rasmussen, 1 Dak. 60; Schlesinger v. Arline, 31 Fed. Rep. 648; Howenstein v. Barnes, 5 Dill. 482; Adams v. Addington, 16 Fed. Rep. 89. And the following sustain the doctrine that the stipulation involves such contingency and uncertainty as to the sum payable as to destroy negotiability: Bank v. Bynum, 84 N. C. 24; Bank v. Gay, 63 Mo. 33; Goodloe v. Taylor, 3 Hawks, 458; Bank v. Marlow, 71 Mo. 618; Samstag v. Conley, 64 Mo. 476; Bank v. Jacobs, 73 Mo. 35; Wood v. North, 74 Pa. St. 407; Johnston v. Speer, 92 Pa. St. 227; Bank v. Larsen, 60 Wis. 206, 19 N. W. Rep. 67; Manufacturing Co. v. Newman, 60 Md. 584: Mahoney v. Fitzpatrick, 133 Mass. 151; Jones v. Radatz, 27 Minn. 240, 6 N. W. Rep. 800; Bank v. Purdy, 56 Mich. 6, 22 N. W. Rep. 93; Altman v. Rittershofer (Mich.), 36 N. W. Rep. 74; Iron-Works v. Paddock (Kan.), 15 Pac. Rep. 574; Farquhar v. Fidelity, etc. Co., 13 Phila. 473. The question has never been determined in this State. It was mooted somewhat in the case of Bank v. Johnson, *ante*, 42 (at the last term), and dismissed with an indication on the part of the present writer unfavorable to the negotiability of such instruments. Such was the inclination of my mind at that time. A more careful investigation into the adjudged cases, and especially a more critical consideration of the reasons upon which the divergent conclusions of other courts are made to rest, have produced the contrary conviction, and lead me to adopt the view first advanced by the Indiana and Kentucky courts, and which has since received the sanction of all recognized texts which discuss the point. Tied. Com. paper, § 28 *b*; 1 Rand. Com. Paper, §§ 205, 206; 1 Daniel, Neg. Inst. §§ 62, 62*a*; Pars. Notes & Bills, pp. 146, 147; 2 Amer. & Eng. Enc. Law, p. 324.

REMOVAL OF CAUSES—FEDERAL COURTS — MANDAMUS — LOCAL PREJUDICE —JURISDICTIONAL AMOUNT—ACTS OF 1887-1888.—The case of *Ex parte* Penn. Co., 11 S. C. Rep. 141, decided by the United States Supreme Court, contains some interesting points involving the new Removal of Causes Act. It is there held that act Cong. March 3, 1887, as re-enacted by act of August 13, 1888, providing that whenever any circuit court of the United States shall decide that a cause has been improperly removed from a State court, and shall order its remand, "such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court remanding such cause shall be allowed," takes away also the remedy of *mandamus* to compel the circuit court to take jurisdiction of a cause and writ of error, and that in order that defendant may remove a cause from a State to a federal court on account of prejudice or local influence, under act of August 13, 1888, § 2, cl. 4, the matter in dispute must exceed the sum or value of $2,000, the jurisdictional amount re-

quired by the first clause of the act. The words in that act, "when it shall be made to appear to said circuit court that from prejudice," etc., require legal proof of the fact of such prejudice, and the affidavit of the manager of a corporation that such prejudice exists, without any statement of facts showing how or why it exists, is not bound to be regarded by the court as sufficient. Upon the first point Bradley, J., after citing the authorities for the general power of the court to issue writ of *mandamus* to an inferior court, to take jurisdiction of a cause when it refuses to do so, says:

But it was expressly held in Railroad Co. v. Wiswall, 23 Wall. 507, that a *mandamus* would lie to compel a circuit court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the State court. The reason was that an order to remand was not a final judgment, and no writ of error would lie. This case is supported by the rule laid down by Chief Justice Marshall, in *Ex parte* Bradstreet, 7 Pet. 634: and, if the decision of the present case depended only on the general rule, the power of the court to issue the *mandamus* would be undoubted. But, in our opinion, the matter is governed by statute. This will be manifest by reference to previous legislation on the subject. The fifth section of the act of March 3, 1875 (determining the jurisdiction of the circuit courts), provided that the order of the circuit court dismissing or remanding a cause to the State court should be reviewable by the supreme court on writ of error or appeal, as the case might be. 18 St. 470, 472. This act remained in force until the passage of the act of March 3, 1887, by which it was superseded, and the writ of error or appeal upon orders to remand causes to the State courts was abrogated. The provision of act of 1887 is as follows: "Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 St. 553. This statute was re-enacted August 13, 1888, for the purpose of correcting some mistakes in the enrollment (25 St. 435); but the above clause remained without change. In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of *mandamus;* and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case, we think, it was the intention of congress to make the judgment of the circuit court remanding a cause to the State court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of *mandamus* could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of *mandamus* is not mentioned in the section, yet the use of the words, "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by *mandamus* as well as that of appeal and writ of error.

CARRIERS OF GOODS—ILLEGAL FREIGHT CONTRACTS — REBATES — POOLING COMBINATIONS.—The case of Cleveland, C. C. & I. Ry. Co. v. Closser, 26 N. E. Rep. 159, decided by the Supreme Court of Indiana, contains some interesting points on the subject of illegal freight contracts. It was held that a contract of shipment is not rendered illegal by the single fact that the carrier gives the shipper a special rate, to be carried into effect by means of a rebate; and in order to defeat the shipper's action for the rebate, the carrier must show that the special rate is an unjust, unfair, or oppressive discrimination in favor of the shipper against the general public. A pooling arrangement entered into between rival railroad companies fixing freight rates, is *prima facie* illegal; and one of the companies which agreed to give the shipper a rebate, in violation of the pooling contract, must affirmatively show that the pool was formed to prevent ruinous competition, and not to establish unreasonable rates, unjust discrimination, or oppressive regulations, before it can rely on the shipper's knowledge of the pool rates as a defense to an action for the rebate. Elliott, J., says *inter alia:*

We preface our discussion of the central question, by saying that we are not at this point dealing with a case where a combination is formed for the purpose of preventing ruinous competition, and in which there is no design to stifle fair competition. We are not required to decide, nor do we decide, that combinations fair to the public, untainted by any sinister design, and formed solely to prevent the destruction of business by unregulated competition, may not be valid. There are, we know, cases sanctioning the doctrine that combinations may be formed where the purpose is lawful, and the means employed not forbidden by positive law or high considerations of public policy. Central Trust Co. v. Ohio Cent. R. Co., 23 Fed. Rep. 306; Chamber of Commerce v. Railroad Co., 32 Amer. & Eng. R. Cas. 633; Leslie v. Lorillard, 110 N. Y. 534, 18 N. E. Rep. 363; Hare v. Railroad Co., 2 Johns. & H. 80; Manchester, etc., R. Co. v. Concord R. Co., 20 Atl. Rep. 383. The doctrine of these cases we neither affirm nor deny; we do, however, declare that they are not relevant to the matter here in dispute. It is, however, both appropriate and necessary to adjudge that a combination between common carriers to prevent competition is at least *prima facie* illegal. The doubt is as to whether any ultimate purpose can save it from the condemnation of the law; there can be no doubt that, unexplained, such a combination for such

a purpose is condemned by public policy. If such a combination can in any event be admitted to be legal, it can only be so where it is affirmatively shown that its object was to prevent ruinious competition, and that it does not establish unreasonable rates, unjust discriminations or oppressive regulations. If such a contract can stand, it must be upon an affirmative showing, and one so full, complete, and clear as to remove the presumption (to which its existence of itself gives rise) that it was formed to do mischief to the public by repressing fair competition. The burden is on the carrier to remove the presumption, and, until it is removed, the agreement providing for the combination gives way before this presumption, and the agreement must be held to be within the condemnation directed against all contracts which violate public policy. Coming to the question which awaits our judgment, and to which we have cleared our path, we affirm that a contract between corporations charged with a public duty, such as is that of common carriers, providing for the formation of a combination, having no other purpose than that of stifling competition, and providing means to accomplish that object, is illegal. The purpose to break down competition poisons the whole contract, and there is here no antidote which will rescue it from legal death. The element which destroys the contract is the purpose to stifle competition, for a combination of rival carriers moved and controlled by that purpose alone is destructive of public interest, and to the last degree antagonistic to sound public policy. The principle on which this rule rests is a very old one, and its place in the law is very firm. The overshadowing element in this case and in kindred cases is the purpose which influences the parties in uniting themselves in a combination, and concerning means to make its purpose effective; for the law abhors a combination which has for its principal object the suppression of competition in matters of commerce in which the public have an interest. Among the early cases establishing and enforcing the general principle which now occupies our attention, are those wherein it is held that an agreement to prevent or hinder competition at public sales is void. For illustrations, although there is a vast number cases, we need not look beyond our own reports. Our court has again and again enforced the general principle we have stated. Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124; Board v. Verbarg, 63 Ind. 107; Maguire v. Smock, 42 Ind. 1; Gilbert v. Carter, 10 Ind. 16; Forelander v. Hicks, 6 Ind. 448; Plaster v. Burger, 5 Ind. 232; Bunts v. Cole, 7 Blackf. 265. "No one," said the court in Hunter v. Pfeiffer, *supra*, "can predicate an enforceable right upon such an agreement." In support of this statement the court cited Atcheson v. Mallon, 43 N. Y. 147; Woodworth v. Bennett, *Id.* 273; Gibbs v. Smith, 115 Mass. 592; Hannah v. Fife, 27 Mich. 172. Relevant and striking illustrations of the scope and force of the general principle are supplied by what are known as the "Sugar Trust Cases," decided by the courts of New York—cases rich in argument and authority. People v. Sugar Refining Co., 3 N. Y. Supp. 401. See, also, Law Literature of Trust Combinations, 23 Abb. N. C. 317; People v. Sugar Refining Co., 121 N. Y. 582, 24 N. E. Rep. 834. The authorities collected in those cases demonstrate the proposition that a trust or combination, having for its purpose the suppression of free competition, cannot live where the common law prevails. There are, however, cases which in their facts bear a closer resemblance to the present than the Sugar Trust Cases; but, after all, it may be said with propriety, the important thing to be secured is a sound and salutary general principle, and not merely cases with closely resembling facts. There is no difficulty in securing the principle we seek, for, cases almost without number assert and enforce it in an almost endless variety of forms and phases. One of the cases near akin to the one before us is that of Hooker v. Vandewater, 4 Denio, 349. In that case competing canal companies combined and agreed to fix an established rate of freight and to divide profits. The agreement was adjudged illegal, the court saying, among other things, that "it is a general proposition that an agreement to do an unlawful act cannot be supported at law; that no right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy." Still closer is the resemblance between this case and that of Texas & P. Ry. Co. v. Southern Pac. Ry. Co. (La.), 6 South. Rep. 888. The court there held a "pooling contract substantially the same as the one described in the appellee's complaint to be void; and in support of its ruling referred to the cases of Gibbs v. Gas Co., 130 U. S. 408, 9 Sup. Ct. Rep. 553; Woodstock Iron Co. v. Richmond, etc., Co., 129 U. S. 644, 9 Sup. Ct. Rep. 402; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Arnot v. Coal Co., 68 N. Y. 558; Craft v. McConoughy, 79 Ill., 346; Morrill v. Railroad Co., 55 N. H. 537; Jackson v. McLean, 36 Fed. Rep. 213; Lumber Co. v. Hayes, 18 Pac. Rep. 392; Association v. Berghaus, 13 La. Ann. 209; Association v. Kock, 14 La. Ann. 168; Glasscock v. Wells, 23 La. Ann. 517, and Cummings v. Saux, 30 La. Ann. 207. The authorities, found on every hand, not only fully support our conclusion that a contract between competing carriers forming a combination for the purpose of stifling competition is, *prima facie*, illegal, but many of them carry the principle to a much greater length. It is enough for us, however, that the law as it has long existed sustains the conclusion we here affirm, since it is neither necessary nor proper for us to go beyond the case before us for judgment.

BREACH OF MARRIAGE PROMISE—DAMAGES—EVIDENCE OF WEALTH OF DEFENDANT.—Two recent cases—Chellis v. Chapman, 26 N. E. Rep. 308, decided by the New York Court of Appeals, and Dent v. Pickens, 12 S. E. Rep, 698, decided by the Court of Appeals of West Virginia—have held that in action for damages for breach of promise to marry, proof may be given of defendant's wealth. In the New York case the evidence offered and held admissible was of defendant's reputation for wealth, and Earl and Peckham, JJ., dissented "on the ground that it was error to receive proof of the defendant's wealth by reputation." In the West Virginia case, however, the evidence held admissible was the pecuniary circumstances of the defendant when the breach occurred, or during the time when he might reasonably have been expected to fulfil it.

TITLE TO LANDS UNDER FRESH WATER LAKES AND PONDS.

In vol. 13 of the CENTRAL LAW JOURNAL, p. 1, is an article on this subject by Judge Thomas M. Cooley. He evidently had special reference to some of the smaller lakes, not like those which the decisions liken to great seas, when he said: "In surveying the public domain for the purposes of sale, the government caused all that were too large to be embraced within a single subdivision of a section to be measured at the water line, and the dry land only was measured for sale." He added: "The waters of many of these lakes and ponds are receding gradually, and some after a time disappear. Under these circumstances, the question who owns the bed is one of considerable importance in the Northwest." We follow this question of his by referring, first, to some cases which have been decided since the date of his article, and will next draw some inferences based, in a great measure, upon his suggestions.

I. Such later decisions show that the proprietorship of such small inland lakes passes to the patentees from the U. S. of the bordering lands. Bristow v. Cormican, decided by the House of Lords in 1878,[1] has an important bearing. If that case had come under the observation of Judge Cooley, it would have influenced a more positive expression by him as to the rights of shore owners as to the proprietorship of such lakes. It was there determined, in regard to a lake called Lough Neagh, one of the largest lakes in Europe, containing nearly 100,000 acres, that "there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake." Also, that the Crown has not of common right a *prima facie* title to the soil of a lake. It was stated by Lord Hatherley, that the said body of water was an inland lake, and therefore not a portion of land belonging to the Crown by reason of its being on the shore of the sea or a navigable strait or river.

The case just cited was noticed in Lincoln v. Davis, 53 Mich. 383, and it was said of it: "The holding that the Crown does not of common right *prima facie* own the title to the soil under the waters of an inland lake, leads necessarily to the other conclusion that such soil belongs to the riparian proprietor." In Smith v. City of Rochester,[2] which was decided in 1883, something more than two years after the date of Judge Cooley's article, the Court of Appeals of that State, speaking by Mr. Chief Justice Ruger, arrived at the conclusion "that all rights of property to the soil under the waters of Hemlock lake (situated in Livingston county, N. Y., and being about seven miles long and one and a half miles wide, and having an outlet, etc.), were acquired by and belong to its riparian owners, while such rights only, over its waters, belonged to the State as pertained to sovereignty alone." The court found that the waters of the lake were a part of the navigable waters of the State, and had actually been navigated by the citizens of the State with scows, steamboats, and other craft for over thirty years, but that the rules of the common law applied, and that the State could not claim the rights of a riparian proprietor, nor could it claim the ownership of the bed of the lake, nor any other rights than those which pertained to its sovereignty over the territory in general. In Clute v. Fisher,[3] decided in 1887, it was held that the soil under the water of inland lakes in that State did not belong to the general government nor to the State, after sale of the bordering lands by the government; that private ownership of lands bounded on navigable fresh water was not restricted to the meander line, and that this doctrine must apply to the small inland lakes, whether navigable or not. Without extending citations bearing upon the question by Judge Cooley, as to who owns the bed of such small inland lakes after the sale of the bordering lands by the government, the matter may be formulated as follows: In the territory formerly known as the "Territory of the United States northwest of the river Ohio," now organized into States, came first in order as to proprietorship of the lands in general, the deed of cession from the State of Virginia of March 1st, 1784. Afterwards the United States caused the public domain to be surveyed for the purposes of sale, and, as supposed by Judge Cooley, the surveyors meandered vari-

[1] 3 H. L. & Privy Council, part 2, page 641.

[2] 92 N. Y. 163.

[3] 56 Mich. 48.

ous fresh water inland lakes to give the topography of the country, and also to furnish data for estimating the quantity of the lands. Thereafter such lands were sold and granted by patents, according to the plats of the surveys. When such grants were made, the government made no reservation of the beds of lakes. The rights of the various shore owners, when considered as a body of proprietors, were substantially those of a single individual owner of the bordering lands, holding by patent or patents from the government. If there was a lake of such dimensions as to be wholly embraced within the lines of a section, the purchaser of that section, whether the contents of the lake were deducted in the estimates in the surveyor general's office of the acreage or not, would take the whole section, including the soil of the lake. It would be just so, in substance, as to the larger of such lakes, covering parts of different sections. In the surveys adjacent to such larger bodies of water, the surveyors extended the section lines to the margin of the body of water, and might not be able to fix more than two or three corners in a particular section; whereas but for the lake, he would have fixed three corners for each quarter section, or eight corners for each section. The section lines, which alone were required to be run, were extended to the lake, and it was impracticable or useless to fix, in the midst of such a body of water, a corner; therefore the corners were fixed on the land only, at the proper section corners away from the lake, and at the intersection of the section lines with the lake at its borders. The surveyor would next meander the lake, in order to report to the surveyor general's office the general topography of the territory surveyed, and give data for estimating areas, as before stated. Now, in any such case, after sale by the government of the bordering lands, it would not be expected that the government would attempt to take away the lake, the chief monument in the survey, and with reference to which sales were made to persons supposing themselves, when buying the bordering lands, to become riparian owners. It might as well be expected that the State of Virginia would come in and claim each lake as not having passed by the deed of cession, as that the United States would, under such circumstances, claim, adversely to the patentees of the bordering lands, either the lake itself or any fringes or sinuosities of land found in after years to impinge upon its meandered bounds, or upon a meander line not marked on the government plats. Suppose, for example, that the field notes of the original survey show that one of the section lines was, at a certain distance from the starting point, terminated at the margin of the lake, the remainder of what would have been such section line being in the lake; would it be expected that the government, after selling the tracts surveyed, would narrowly scan the correctness of the surveyor's estimate of the length of the line carried to the margin of the lake? It would seem that this should not be so. The lake itself should be treated as the monument.[4]

II. The rules which apply to the vast fresh water lakes or inland seas, such as Lake Michigan, differ from those which apply to the inland or small fresh water lakes of which we have been speaking. The great lakes, of which Lake Michigan may be taken as an example, are treated as great inland seas; and, as was held in Seaman v. Smith,[5] "the line at which the water usually stands when free from disturbing causes, is the boundary of lands in a conveyance calling for that lake." This is substantially the same as the rule which is applied to the salt waters, and to rivers within the ebb and flow of tide, and in general harmony with the doctrines of the common law as to waters which were by that law denominated public or navigable. In respect to the soil under such waters, it has not been held that it has been retained by, or belongs to the United States. It passed to the States, they having the same rights of sovereignty and jurisdiction in this respect as the original States.[6] We do not speak, at present, of qualifications of the rights of the State in respect to the soil under waters of such a lake as Lake Michigan, as, for example, of the right of accretion which belongs to the shore owner. It is not in the line of this article to treat further of matters specially applicable to navigable waters, either of such as were navigable at the common law or of such as, under the decisions of some States, are placed on a somewhat similar footing as being navigable in fact. We merely note a difference

[4] Piper v. Connelly, 108 Ill. 646.
[5] 24 Ill. 521.
[6] Pollard v. Hagan, 3 How. 212.

in the classification of cases, some of which treat of waters which correspond with the definition of navigable or public waters according to the common law, while others treat of waters navigable in fact; and still another class, more appropriate to be considered here, treat of waters which are not navigable.

It may be said of the last mentioned waters, as well of the small inland lakes as of the smaller rivers, that there does not seem to be any solid ground for distinguishing, in the law of boundaries, between such of them as were meandered by the government surveyors. For example, a small lake, which was a basin or reservoir for waters having an outlet into a river, may have been meandered, and the river itself may also have been meandered. Now, why should the meander line, not marked on the plat in either case, be treated as a line of boundary, in the case of the lake any more than in the case of the river?

A notice of this subject, even though very brief, would be incomplete, especially when treating of rules in regard to the law of boundaries, without alluding to a peculiarity that applies to the New England States more especially, and not to the Western States. It consists in this: A colony ordinance was passed in Massachusetts about 250 years ago, by which ponds of over ten acres were declared public, and after that time such bodies of water were not allowed to be appropriated by individuals. Since that enactment the colonies and States respectively in New England, have held such bodies of water as trustees for the public. As was said by Shaw, C. J., in Cummings v. Barrett,[7] adjacent or riparian owners of lands bordering on such ponds have been allowed to exercise some rights in regard thereto, especially in using the water "for domestic purposes and for watering cattle." But such reservation by and to the colonies and States respectively of such bodies of water, had the natural result of causing adjudications in New England declaring, in respect to boundaries, that conveyances of lands on such bodies of water are to be construed as giving rights only to the margin of the water, or at most to low water mark. Of course, as the State has reserved the body of water, individual proprietors cannot convey it, nor any part of it. Hence there is no question there, as between private individuals, as to the right of ownership of the soil under such waters, because such ownership is in the State, in trust for the public. Under what may, therefore, be called the New England rule as to the proprietorship of great ponds, the law of boundaries, as there maintained, under conveyances of lands on the borders of great ponds, is thus quite analogous to the law of boundaries under conveyances of lands bordering on the great inland seas, such as Lake Michigan.

III. But the Western States, speaking generally, and not of certain special enactments, have not received any grant from the United States of the small inland lakes or ponds, nor have they enacted, nor would they have power to enact, such laws or ordinances in regard thereto as were enacted in Massachusetts, as before stated. The rights of the riparian proprietors of these small inland lakes follow the common law as to boundaries. Such lakes are private waters. The proprietorship of their beds has not been retained by the United States when granting the bordering lands, nor did it pass to the States on their admission into the Union. It passed to the several purchasers from the United States of the lands bordering on such lakes. It follows that it is proper to state more positively than Judge Cooley has done, the right of proprietorship of such adjoining owners in the bed or soil of such small inland lakes, independently of the rules as to accretion, alluvion, or reliction pertainining to proprietorship of lands on salt waters and the great inland seas. Judge Cooley, in his article,[8] reasoned that under certain decisions in Wisconsin and Michigan, the beds of the small lakes, the waters of which recede and disappear, come at last to be private property without any grant from the State. It might have been said in favor of the patentees owning the bordering lands, that such beds are private property; for no further grant from the United States is requisite, nor is any from the State needed. Of course, this simplifies the matter; and it is from the wisdom of the common law that it is simplified. The rules of accretion, alluvion and reliction have no special pertinency to these small lakes in the Western States. There are rules appropriate to such bodies of water, under which their beds are subject to be divided between the riparian proprietors. These

[7] 10 Cushing, 188.

[8] 13 Cent. L. J., 5.

rules have sometimes been adapted to special circumstances, depending in part on the shape of the original body of water, but they take into special consideration the length of the shore lines of the different proprietors. With reference to such division between shore owners, the Massachusetts cases as to the division of flats, etc., are specially instructive, while those in Michigan and other States are of high value and authority. EDISSERTATOR.

WATERS—NAVIGABLE WATERS—RIGHTS OF RIPARIAN OWNERS.

PACKER V. BIRD.

Supreme Court of California, January 19, 1891.

A patent by the federal government, which in terms bounds the land on the margin of a stream navigable in fact and above tide-water, carries the title only to the water's edge, and not to the center of the stream.

FIELD, J.: This is an action for the possession of an island, embracing about 80 acres of land, in the river Sacramento, within the county of Colusa, in the State of California. The plaintiff alleges ownership of the premises in 1867, and their continued ownership afterwards, the entry of the defendants thereon in January, 1883, without right or title, and their continued unlawful possession thereof ever since, to his damage of $200. The answer of the defendants is a general denial of the allegations of the complaint. The issues were tried by the court without the intervention of a jury, by stipulation of the parties. The court found for the defendants, and directed judgment in their favor. A motion for a new trial was denied, and on appeal to the supreme court of the State the judgment and the order refusing a new trial were both affirmed. To review that judgment the case is brought to this court. The river Sacramento is navigable from its mouth or outlet to a point above the premises in controversy. Indeed it is one of the great rivers of the State, and is navigable over 250 miles. The muniments of title introduced by the plaintiff consisted of a patent of the United States issued in December, 1857, to Francis Larkin and others, for a tract of land in the county of Colusa known as the "Rancho of Larkin's Children;" a decree partitioning the land among the patentees, and intermediate conveyances from one of them to the plaintiff. In June, 1857, a survey of the land covered by the patent was made by the proper officers of the United States pursuant to a decree of the district court of the United States for the northern district of California, rendered in January, 1856, confirming an imperfect Mexican grant of the tract, and ascertaining and determining its location. That decree describes the land as follows: "Commencing at the northerly boundary line of said rancho, at a point on the Sacramento river, just two leagues northerly from the rancheria called 'Lojot' and running southerly on the margin of said river to a point which is five leagues south of the place of beginning; thence west two leagues; thence north in a parallel line with said river, and two leagues therefrom, five leagues; and thence east two leagues to the place of beginning, and so as to contain the area of ten square leagues within said lines." The survey, which is incorporated in the patent, describes the eastern boundary line of the tract as commencing at a certain oak post "on the right bank of the Sacramento river," and thence "traversing the right bank of the Sacramento river down stream" certain courses and distances. Among other things, the court found that from 1853 to 1858, and both prior and subsequent thereto, the waters of the Sacramento river divided into two streams at the upper or northerly end of the island in controversy; that one of the streams flowed through a channel extending around the easterly side of the island, and the other through a channel extending around the westerly side; that during this period both of the channels were plain and well defined, and had high banks, and the waters of the river flowed, and still continue to flow, through both of them at all seasons of the year; that the two channels and streams of water reunited at the lower or southerly end of the island, and that each of the channels and streams constituted a part of the Sacramento river, which was navigable, "both in fact and by statute;" that, during the greater portion of each year, the channel on the westerly side of the land in dispute was navigable and was during the period mentioned actually navigated; but that the usual and most direct route for steamers was along the channel running east of the island.

The question presented is whether the patent of the United States, describing the eastern boundary of the land as commencing at a point on the river, which was on the right and west bank, running southerly on its margin, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption. It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that, where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested in England in the crown, and in this country in the State within whose boundaries

the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce. In England, this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the streams. No rivers there, at least none of any considerable extent, are navigable in fact, which are not subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide-water, and by vessels larger than any which sailed on the seas when the common-law rule was established. A different test must therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of The Daniel Ball, 10 Wall. 557, 563: "They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters, when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common-law doctrine on this subject prevailing in England is held in some of the States, but in a large number has been considered as inapplicable to the navigable waters of the country, or even if prevailing for a time has given way, or been greatly modified, under the diffent conditions there. It has been adopted in most, if not all, of the New England States. In New York, in the earlier cases, it was considered as in force, and in *Ex parte* Jennings, 6 Cow. 518, was formally declared. There a patent of lands by the State bounded on the margin of a river above tide-water, was held to carry the land granted to the middle of the stream, the court stating that the rule was otherwise where the land was bounded on a navigable river, but adding that by the term "navigable river" the law did not mean such as is navigable in common parlance; that the smallest creek might be so to a certain extent as well as the largest river, without being legally a navigable stream; and that the term has in law a technical meaning, and applies to all streams, rivers, or arms of the sea where the tide ebbs and flows. This doctrine was modified, and finally overruled, in subsequent cases. In People v. Appraisers, 33 N. Y. 461, 499, the whole subject of the rights of riparian owners on navigable streams, whether affected or not by the ebb and flow of the tide, was elaborately considered, with a careful examination of the adjudged cases in the different States, and the conclusion reached was against the applicability of the common-law rule in this country. The court, in its opinion, refers to the great embarrassment experienced by courts, judges, and text-writers in applying the principles of the common-law to the waters of this continent, the variant conclusions reached by them, and the contradictory and unsatisfactory reasons given for the results arrived at; and, after tracing the progress of judicial discussion of the doctrine of the common-law on the subject, it expresses satisfaction that the discussion had culminated in the decision by the court of ultimate appeal repudiating the applicability of the doctrine to the rivers of that State, and establishing what it terms "the better doctrine of the civil law."

In Pennsylvania, the common-law doctrine was never recognized. In Bridge Co. v. Kirk, 46 Pa. St. 112, 120, the supreme court of that State, in holding that the river Monongahela was a navigable stream, and that its soil up to low-water mark, and the river itself, were the property of the commonwealth, said: "We are aware that, by the common-law of England, such streams as the Mississippi, the Missouri, the rivers Amazon and Platte, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges, and the Indus, were not navigable rivers, but were the subject of private property, whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded continental Europe, and which took its rise in a country where there were was a tideless sea, recognized all rivers as navigable which were really so, and this common-sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth."

In the courts of the western States there is much conflict of opinion, some, like the courts of Illinois, adopting the common-law rule to its fullest extent; and others, like the courts of Iowa, repudiating its application in determining the navigability of the great rivers, and the rights of riparian owners upon them. A very elaborate consideration of the adjudged cases on the subject is found in McManns v. Carmichael, 3 Iowa, 1. Indeed, the opinion of the supreme court of Iowa in that case, and the opinion of the court of appeals of New York in People v. Appraisers, above cited, contain an exhaustive and instructive consideration of the whole subject, with a careful review of the decisions of the courts of the States. In this case, we accept the view of the supreme court of California in its opinion, as expressing

the law of that State, "that the Sacramento river, being navigable in fact, the title of the plaintiff extends no further than the edge of the stream." Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674.

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream. It is therefore important to ascertain and determine what view will be taken by the courts of the United States in the construction of grants of the general government in conferring ownership, when they embrace lands bordering on navigable waters above the influence of the tide. How far will such grants be deemed to extend into the water, if at all? From the conflicting decisions of the State courts cited, it is evident that there is no such general law on the subject as will be deemed to control their construction. In the courts of the United States, the rule of the common-law in determining the navigability of rivers, and the effect thereof upon the jurisdiction of the court, has been disregarded since the decision of the case of The Genesee Chief, 12 How. 443, 455. This court there said that there was nothing in the ebb and flow of the tide which made a stream suitable for admiralty jurisdiction, nor anything in the absence of the tide that rendered it unfit; that if a stream was a public navigable water, on which commerce was carried on between different States and nations, the reason for the jurisdiction was precisely the same; and that any distinction made on that account was merely arbitrary, without any foundation in reason, and indeed would seem to be inconsistent with it. The eminent chief justice who delivered the opinion in that case explained how in England the ebb and flow of the tide became the test of the navigability of a stream, as we have stated it above; that there "tide-waters," with a few small and unimportant exceptions, meant nothing more than "public" rivers as contradistinguished from "private" ones; and that hence arose the doctrine of admiralty jurisdiction, which was confined to the ebb and flow of the tide, in other words, to public navigable waters. He then added: "As the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was, in process of time, lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And, under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters."

In Barney v. Keokuk, 94 U. S. 324, the same subject in some of its features was under consideration in this court, and the language used is especially applicable to cases like one before us. That action was against the city of Keokuk and a steam-packet company, to recover the possession of certain premises occupied by them with railroad tracks, buildings, and sheds on the bank of the Mississippi river, and in that city. The court, in considering the question presented, observed that "the confusion of navigable with tide-water, found in the monuments of the common-law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and, under the like influence, it laid the foundation, in many States, of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor, rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principle was laid down in Martin v. Waddell, 16 Pet. 367; Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of The Genesee Chief, 12 How. 443, has declared that the great lakes, and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of 'navigable waters,' and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending, if it could extend, its survey and grants beyond the limits of high water." The legislation of congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them. As early as 1796, in an act providing for the sale of such lands in the territory north-west of the river Ohio and above the mouth of the Kentucky river, congress declared "that all navigable rivers within the territory to be disposed of by virtue of the act shall

be deemed to be and remain public highways; and that, in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and bed thereof shall become common to both." Act May 18, 1796, § 9, (1 St. 468.) In Railroad Co. v. Schurmeir, 7 Wall. 272, 288, the court said that, in view of this legislation and other similar acts, it did not "hesitate to decide that congress in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter but that the title to lands bordering on navigable streams should stop at the stream and that all such streams should be deemed to be and remain public highways." The same rule applies when the survey is made, and the patent is issued, upon a confirmation of a previously existing right or equity of the patentee to the lands, which, in the absence of such right or equity, would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the water of the stream. The language of the decree of confirmation describing the tract confirmed, and the language of the survey incorporated in the patent, both clearly indicate that the margin of the river was intended as the eastern boundary of the tract confirmed, and we find nothing either in any act of congress or in any decision of the federal courts which would enlarge the effect of the grant. The title of one claiming under the patent does not, therefore, extend beyond the edge of the stream. The judgment of the court below is accordingly affirmed.

NOTE.—The law of navigable waters is one of the best of many illustrations of the effect of the physical features of the country in causing the departures in American law from the principles of English jurisprudence. As is well known, a navigable river was technically defined at common law to be one in which the tide ebbs and flows. Royal Fishery of the River Banne, Davies' Rep. 149; *De Jure Maris et Brachiorum;* State v. Sargeant, 45 Conn. 358; People v. Tibbetts, 19 N. Y. 523; Commonwealth v. Chapin, 15 Pick. 199. But by the highest court in this country, as shown by the leading case, and by the supreme court of many of the States, navigability in law has been made to depend upon navigability in fact. This departure, based upon physical difference, was first promulgated in 1810. In the meantime it has been often followed and reaffirmed, and therefore made of vast importance, both in determining the rights of riparian owners and in defining the extent of the jurisdiction of the federal courts in admiralty causes. By the constitution the judicial power of the federal courts was extended to "all cases of admiralty and maritime jurisdiction." It was at first the general opinion that this jurisdiction could not be extended beyond tide water. But by the decision in the case of The Genesee Chief, 12 How. 457, rendered in 1851, the doctrine was finally established, "that the jurisdiction, as conferred on the federal courts by the constitution, extends wherever ships float and navigation successfully aids commerce, whether internal or external."

The effect of this new doctrine upon riparian rights, however, was less extensive. It depended upon the view taken of the law by the State tribunals. Not a few of these adhered to the common law rule; but in spite of that, it may now be safely said that the tendency of the American law is in favor of the position taken by the Supreme Court of Pennsylvania in Carson v. Blazer, 2 Binney, 475, which was the earliest case repudiating the English doctrine upon this subject as inapplicable to the physical features of the country. In several of the States the common law rule on this subject is still upheld; but in none to the extent that the public have not the right to the use as a highway of all streams that will float boats. Claremont v. Carleton, 2 N. H. 369; Middleton v. Pritchard, 4 Ill. 560; The Montello, 20 Wall. 439; Ingraham v. Wilkinson, 4 Pick. 268; O'Fallon v. Daggett, 4 Mo. 343; Palmer v. Mulligan, 3 Caines, 315; Spring v. Russell, 7 Me. 273; Commonwealth v. Alger, 7 Cush. 53; Commissioners v. Withers, 29 Miss. 29; Cana Commissioners v. People, 5 Wend. 423; McManus v. Carmichael, 3 Iowa, 1; People v. Platt, 17 Johns. 195; Cates v. Wadlington, 1 McCord, 580; Morgan v. Reading, 3 S. & M. 366; Shurk v. Schuylkill County, 14 Serg. & R. 71; Horne v. Richards, 4 Cal. 441; Gavit v. Chambers, 3 Ohio, 495. The principal difference of opinion is as to who has the title of the soil of the river's bed, and in what rivers does the State own that title. The decisions are unanimous that in streams that are practically navigable and in which the tide ebbs and flows, the State owns the bed (Flanagan v. Philadelphia, 42 Pa. St. 219; Rowe v. Granite Ridge Corporation, 21 Pick. 344; Wilson v. Forbes, 2 Dev. & L. 30; Cobb v. Davenport, 32 N. J. L. 369; Glover v. Powell, 10 N. J. Eq. 211; People v. Tibbetts, 19 N. Y. 523; Smith v. Levinus, 8 N. Y. 472; Keyport Steamboat Company v. Farmers' Transportation Company, 18 N. J. Eq. 13; State v. Gilmanton, 14 N. H. 467)—by some to low water mark (People v. Canal Commissioners, 33 N. Y. 461; Ryan v. Brown, 18 Mich. 196; Martin v. Nance, 3 Head. 650; Stover v. Jack, 60 Pa. St. 339; Edder v. Burrus, 6 Humph. 367; Wainwright v. McCullough, 63 Pa. St. 66; Ensinger v. People, 47 Ill. 384; Martin v. Evansville, 32 Ind. 85; O'Fallon v. Daggett, 4 Mo. 343; Bullock v. Wilson, 2 Porter, 447; Sherlock v. Bainbridge, 41 Ind. 35), by others to high water mark. East Haven v. Hunningway, 7 Conn. 186; Niles v. Patch, 13 Gray, 254; Stewart v. Fitch, 30 N. J. L. 220; Wheeler v. Spinola, 54 N. Y. 377. The common law doctrine was that the land between the high and low water lines belonged to the king; but this rule has been changed by a considerable number of the States. The Pennsylvania rule (see Stover v. Jack, 60 Pa. St. 339) that a riparian grantee takes an absolute title to high water mark and a qualified title to low water mark, has been adopted by other States. He is given, by these decisions, an exclusive right to build a wharf below high water mark in front of his premises. Musser v. Hershey, 42 Iowa, 356; Dutton v. Strong, 1 Black (U. S.) 25.

It is in regard to the beds of navigable fresh water streams that the great contrariety of opinion exists. One class of States hold that if a water-course is navigable in a legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. Benson v. Morrow, 61 Mo. 351; Holbert v. Edens, 5 Lea, 207; Posey v. James, 7 Lea (Tenn.), 104. This position has been approved by courts that for property reasons adhered to precedents. The Supreme Court of Mississippi, in the Steamship Magnolia, v. Marshall, 39 Miss. 109, drew a distinction between public and navigable rivers, and in an able opinion tried to show that the decisions repudiating the com

mon law doctrine on this subject were the result of a misconception of the reasons upon which the common law distinction is founded. The fresh water navigable rivers, it was held, are called public rivers, not in reference to the property of the river, for that is in the individual who owns the soil; but in reference only to the public use. Tidal waters, on the other hand, are highways of nations, and very properly the title to their beds is in the State. The court, therefore, declared that the public have a right of way over fresh water streams which can be navigated, but that the title to the bed is in the riparian owners, and the boundary line is the thread of the stream. The authorities are exhaustively reviewed in the opinion; but many cases are cited as furnishing authority for the position taken by Judge Harris, which have since been overruled or considerably modified. A decision of the Supreme Court of Missouri (O'Fallon v. Daggett, 4 Mo. 343), is referred to, but in Pearson v. Morrow, 61 Mo. 350, it is said: "The application of the principle as made by the text writers and judges to non-navigable streams cannot be transferred to our great public rivers. The proprietor of land on the banks of the Missouri river does not own *ad filium aquae*, but only to the water's edge, though undoubtedly still entitled to whatever increment may be added to his land. He is not, however, the owner of an island that springs up in the midst of the stream, whether the island be on one side or the other of the center of the stream. He goes only to the margin of the river." (See also The Schools v. Ruley, 10 Wall. 110; Railroad v. Schurman, 7 Wall. 272; Yates v. Milwaukee, 10 Wall. 504. There has also been some fluctuation in the law of Tennessee. Judge Harris declared that it is well settled in that State that the ownership of the soil in fresh water rivers, though capable of navigation, and navigable in fact, is in the riparian owner to the middle of the stream, subject to the public easement for the purposes of transportation. But the authority quoted is no longer the law of that State. In Elder v. Burrus, 6 Humph. 388, the court say that "the owners of land on a navigable stream above tide water have title only to ordinary low water mark, and not to the centre of the stream." In Michigan it is still held that the "soil under tideless public rivers to the thread of the stream is in the owner of the adjacent bank (Lorman v. Benson, 8 Mich. 18; Clark v. Campan, 19 Mich. 325; Ryan v. Brown, 18 Mich. 196; Rice v. Ruddiman, 10 Mich. 125), and he is entitled to every beneficial use of it that he can make consistent with the public easement. Among the incidental rights belonging to him as such owner are those of alluvion and dereliction, access to the navigable part of the river from the front of his lot, and the right to make a landing wharf or pier for his own use. See Yates v. Milwaukee, 10 Wall. 504. This doctrine is recognized in Indiana, Illinois, Connecticut, Vermont, Massachusetts, Maryland, Virginia, Delaware and New Jersey. The early decisions in support of it all proceed upon the theory that the ebb and flow of the tide, which was looked upon at common law as such a controlling circumstance in determining whether a river was *flumen regale*, was fixed upon as controlling evidence of navigability, and it was this latter fact which really decided the character of the river. Judge Harris attempted to show, though supporting the common law rule of proprietorship, that it had an altogether different foundation. He argued that the term navigable, as used by common law writers, has reference to the right which all nations have, of navigating the ocean and its arms as common highways of mutual intercourse and commerce, over which no people or nation has exclusive control, and in which no nation has a right of property. Then he adds that the ownership of the beds above tide water is properly in the riparian owner. But this view is not well supported by the early authorities, and, indeed, there is no reason more solid and satisfactory advanced than that for convenience, the circumstance of the ebb and flow of the tide was simply adopted as decisive evidence of navigability.

There is an exception made in three of the States above mentioned, which was presented by one judge as furnishing a principle upon which uniformity in the law on this question might be obtained. These exceptions are that the title to the bed of the large rivers forming the boundary line between States is in the States themselves. The decisions are put upon the ground that such streams should be classed as the highways of nations, as the States are entirely independent bodies politic. The same courts maintain that the intraterritorial streams cannot be called international highways, and therefore the title to the soil of such streams should be vested in the riparian owners, subject to the public right of navigation. They contend that there is no greater reason why the bed of a stream which is navigable should belong in fee to the State because of the public right of way over it, than that the soil of a public road should belong to the State because of a similar user.

The opposite view, which is sustained by the principal case, that a doctrine of private ownership is not suited to a country with such commercial highways as the Mississippi, Ohio and Missouri rivers, is presented with great force of reasoning by the courts of New York, Pennsylvania, a majority of the southern and nearly all of the western States. In all of these States, if a stream, whether navigable or not navigable, is referred to in a deed as the boundary of the land conveyed, the stream will be held to be the monument, and the thread of the stream the boundary line. If the land is described as "running along" or "bounding on" a river, even though the further description is "extending from" one stone on the shore to another, the same construction will be placed upon it. A line drawn at right angles with the shore from the objects referred to will locate the termini of the boundary in the centre of the stream. McCullough v. Aten, 2 Ohio, 425; Newhall v. Ireson, 13 Gray, 262; Lunt v. Holland, 14 Mass. 150; Newton v. Eddy, 23 Vt. 319; Cox v. Treedley, 33 Pa. St. 129; Commonwealth v. Alger, 7 Cush. 97; Cold Springs Iron Works v. Tolland, 9 Cush. 492; Luce v. Carley, 24 Wend. 451; Robinson v. White, 42 Me. 218; Railroad v. Schurmeier, 7 Wall. 286. But even in these States a grant expressly stated to be bounded on the bank or shore of the stream will not carry title to the bed of any part of the stream.

Where the view taken by the United States Supreme Court, that the proprietorship of the beds and shores of navigable waters belong to the State by their inherent sovereignty, is accepted, the State must be held to own the fish in the rivers so far as they are capable of ownership while running. Bradford v. Cressy, 45 Me. 9; Babcock v. Utter, 1 Abb. Pr. 27; Daniels v. Railroad Company, 20 N. H. 85; Watson v. Peters, 26 Mich. 516; Dunlap v. Stetson, 4 Mason, 349; Halsey v. McCormack, 13 N. Y. 296. The riparian owner has no right of fishing in front of his lands that all citizens of the State do not possess, and the privilege may be taken from him entirely. Lansing v. Smith, 4 Wend. 9; People v. Tibbetts, 19 N. Y. 523. It is a subject over which the State's control is absolute. It may

appropriate all of its navigable waters and their bed[5] to be used by its own people exclusively as a common for taking and cultivating fish. This right may also be given to any one to the total exclusion of others. Chief Justice Waite, in commenting on this question, said: "The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry land, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might, by appropriate legislation, confine the use of the whole to its own people alone." McCready v. Virginia, 94 U. S. 391; Gough v. Bell, 2 Zab. 455; Townsend v. Brown, 4 *Id.* 87. But if, on the other hand, the riparian owner owns the land under the river, subject to the public easement of navigation, the right of fishing belongs to him and may be exercised by him exclusively; the only restriction, in the absence of a statute, being that he must not obstruct navigation in any way. Beckman v. Kreamer, 43 Ill. 447; Chalder v. Dickinson, 1 Conn. 382; Vinton v. Welsh, 9 Pick. 87; McFarlin v. Essex County, 10 Cush. 304; Waters v. Lilly, 4 Pick. 199. The right to the use of water is governed by a similar principle. It is a right of property dependent upon the ownership of the land over which the water flows. The owner of the bed has therefore more than a usufruct as the water passes along. He has a property in the water itself. Cary v. Daniels, 5 Metcf. 236; Vansickle v. Haines, 7 Nev. 249. It is an incident of the land to the extent that the owner of the latter has a right to have the water continue to flow in its natural course, independent of any particular use he may have for it, for the fertility which its natural flow imparts to the soil. The rule as to his right of use is that he may have a reasonable use of the water for domestic purposes and for irrigation (Lux v. Haggin, 4 Pac. Rep. 919; Ware v. Allen, 5 N. E. Rep. 629; Pitts v. Lancaster, 13 Met. 156; Davis v. Gitchell, 50 Me. 602; Gould v. Boston Duck Company, 13 Gray, 442; Snow v. Parsons, 28 Vt. 459; Hayes v. Waldron, 44 N. H. 580; Mayer v. Appold, 42 Md. 442; Springfield v. Harris, 4 Allen, 494); and this reasonable use is a question of fact. It must not be such a use as will be prejudicial to other riparian proprietors. Anderson v. Railway Company, 5 S. W. Rep. 49; Woodin v. Wentworth, 23 N. W. Rep. 813; Wilcox v. Hausch, 3 Pac. Rep. 108; Reservoir Company v. People, 9 Pac. Rep. 794; Van Orsdal v. Railway Company, 9 N. W. Rep. 379; Weiss v. Steele Company, 11 Pac. Rep. 255; Railroad Company v. Miller, 3 Atl. Rep. 780; Jones v. Adams, 6 Pac. Rep. 442; Mason v. Cotton, 4 Fed. Rep. 792; Learned v. Tangeman, 4 Pac. Rep. 191; Roller Mills v. Wright, 15 N. W. Rep. 167; Creighton v. Irrigation Company, 7 Pac. Rep. 658; Moore v. Water Works, 6 Pac. Rep. 494.

The navigability of a river is a question of fact to be determined by the jury. Olive v. State, 86 Ala. 88. The rule laid down in The Montello, 20 Wall. 430, is that it depends on whether the river, in its natural state, is such that it affords a channel for useful commerce. This view has been affirmed in many recent decisions. The Supreme Court of Wisconsin says (Olson v. Merrill, 42 Wis. 203): "It is the settled law of this State that streams of sufficient capacity to float logs to market are navigable, and it is not essential to the public easement, that this capacity be continuous throughout the year; but it is sufficient that the stream has periods of navigable capacity ordinarily recurring from year to year, and continuing long enough to make it useful as a highway."

JESSE A. MCDONALD.

CORRESPONDENCE.

HIRSCHL'S LEGAL HYGIENE.

To the Editor of the Central Law Journal:

I trust you will allow me, as an old friend of and contributor to your journal, a few lines in your columns by way of reply to your review, March 27, 1891, of my "Legal Hygiene." Your criticism seems to imply that I had undertaken to write a book for the legal profession and had failed therein. You assert that I have produced a book of "absolute worthlessness to lawyers." Or, as you say, "to lawyers there is nothing substantially new, except in its treatment, which is interesting."

Now, I admit fully the correctness of your assertions, but desire to say that I did not write it for lawyers, and have never claimed nor advertised it as such, hence object to being put upon record as though I had failed in my undertaking. I trust if the leisure ever comes to me in which I can prepare a work for the profession generally, that I may then show myself worthy of your esteemed approval.

I have never claimed for my book anything more than that it is valuable to business men, *law students* and perhaps also to practitioners *just beginning.* T these it is full of practical hints, obtainable only by many years of experience.

I have written the book as a protest against our present high school and collegiate curricula, which, as I say, instruct our children to contract debts and risk their estates in perhaps four different languages, but fail in any one to teach them how to accumulate property or even protect from loss that which they may inherit.

Further, as a protest against "form books," "manuals," etc., or, as Prof. Hammond so kindly puts it:

"You are perfectly right in saying that the books of 'every-man-his-own-lawyer class' are injurious to those who depend upon them.

"The great merit of your book is that it deals in warnings more than directions, and will keep men out of the law instead of getting them into it. There is really a great deal of good law in it, and I have been even surprised to see how clearly you can state some of the most difficult cases that arise in ordinary business so as to show what a business man ought *not* to do."

Trusting that I have not taken too much of your space, and feeling sure that your spirit of fairness will grant me "my day in court," I am,

A. J. HIRSCHL.

[We insert the above to correct any improper construction of the language of our review, which seems to have been unfortunately worded. What we said about the worthlessness of the book to lawyers was more in the spirit of fun. Hereafter we shall label our jokes. As a matter of fact, however, the author admits fully what we but half way intimated, viz.: that there is nothing new in the book for the lawyer. And as we are not publishing a journal for the general public, we did not consider it necessary to go

further. This much, however, we are glad to say that we have derived much pleasure in the reading of "Legal Hygiene," and have found it full of good suggestions, wise hints and sensible warnings, all put together in a neat, attractive and sprightly manner.—EDITOR.]

RECENT PUBLICATIONS.

AMERICAN AND ENGLISH ENCYLOPÆDIA OF LAW. Vol. 14.

The present volume of this now well established series maintains the standard of excellence laid down by previous ones, and contains, probably, more important topics than any that has yet appeared. The articles on malicious prosecution, *mandamus*, marine insurance, maritime liens, marriage, marriage settlements, married women, and master and servant are especially worthy of commendation. The citation of cases is full and complete, and of the latest. It would seem that one might be able to practice law successfully anywhere with a set of these volumes; for it certainly can be said that in most instances the articles contain all the cases of value that may be found on the particular subjects; and as a rule, the articles are as thoroughly prepared and as philosophic in their treatment as text books. All this gives to the practitioner in compact form and in a few volumes veritable treatises on every question of interest in modern practice.

AMERICAN STATE REPORTS. Vol. 16.

This volume contains many interesting cases, notably Yellow Stone Kit v. State (Ala.), as to what is or is not a lottery, with extensive note; Spring Valley Water Works v. City (Cal.), as to powers of municipal corporations and water boards in the fixing of water rates; Village of Carterville v. Cook (Ill.), as to liability in case of concurrent negligence of two or more persons, also with exhaustive note; Zigler v. Menges (Ind.), as to constitutionality of and power under act for the reclamation of wet lands and the draining of marshes and ponds; Rushville Gas Company v. City of Rushville (Ind.), on the subject of a "visible quorum" of municipal assembly in the adoption of ordinances; Hancock v. Yaden (Ind.), involving power of legislature to prohibit contracts waiving right to receive wages in money; Wygal v. Bigelow (Kan.), involving rights and remedies of chattel mortgagor whose property has been wrongfully sold; Vanderlip v. City (Mich.), as to what constitutes a taking of property by city in grading of streets within constitutional inhibition.

BOOKS RECEIVED.

GENERAL DIGEST OF THE DECISIONS of the Principal Courts in the United States. Refers to all Reports, Official and Unofficial, published during the Year ending September, 1890. Annual being Volume V. of the Series. Prepared and Published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y. 1890.

DIGEST OF INSURANCE CASES, Embracing the Decisions of the Supreme and Circuit Courts of the United States, of the Supreme and Appellate Courts of the various States and Foreign Countries upon Disputed Points in Fire, Life, Marine, Accident and Assessment Insurance, and affecting Fraternal Benefit Orders. Reference to Annotated Insurance Cases and Leading Articles in Law Journals on Insurance. For the year ending October 31, 1890. By John A. Finch, of the Indianapolis Bar. Indianapolis: The Roug Notes Company, Publishers. 1890.

THE LAW OF EXPERT TESTIMONY. By Henry Wade Rogers, A.M., LL.D., President of the Northwestern University, formerly Dean of the Law School of the University of Michigan. Second Edition. Rewritten and Enlarged. St. Louis, Mo.: Central Law Journal Company, Law Publishers, and Publishers of the CENTRAL LAW JOURNAL. 1891.

THE LAW OF INSURANCE, as applied to Fire, Life, Accident, Guarantee and other Non-marine Risks. By John Wilder May. Third Edition, Revised, Analyzed and Greatly Enlarged. By Frank Parsons. In two Volumes, Vols. I and II. Boston: Little, Brown & Co. 1891.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. APPEAL—Costs.—Under 2 Comp. Laws Utah 1888, § 3099, providing that the party ordering a transcript of the testimony or proceedings must pay the reporter's fees, an appellant who gets the judgment reversed cannot collect the costs of such transcript ordered by him, from the appellee.—*Marks v. Culmer*, Utah, 25 Pac. Rep. 746.

2. APPEAL—Dismissal — Mistake. — Where an appeal from a justice is dismissed for want of prosecution, the fact that such dismissal was asked for because the attorney mistook the law as to the liability of the sureties on the appeal-bond does not authorize the circuit court at a subsequent term to set aside the dismissal under Rev. St. Wis. § 2832.—*Main v. McLaughlin*, Wis., 47 N. W. Rep. 938.

3. APPEAL—Docketing Case—Laches.—*Held* that since members of the supreme court are bound to know its rules and as the two years allowed by Rev. St. U. S. § 1008 for bringing a writ of error elapsed before the docketing, plaintiff was upon the facts guilty of gross laches and the case must be dismissed.—*Green v. Elbert*, U. S. S. C., 11 S. C. Rep. 188.

4. APPEAL—Jurisdictional Amount.—Rev. St. U. S. § 966, which allows interest on judgments recovered in the federal courts at the rate allowed by law on judgment recovered in the State courts, does no exclue the idea of a power in several States to allow interest on verdicts; and since Act Pa. 1859 provides for the entry of judgment for the amount of the verdict, with interest thereon from the day of its rendition, the Supreme Court of the United States has jurisdiction of an appeal from the circuit court of Pennsylvania where the amount of the verdict and the interest thereon to the time of the entry of the judgment exceeds $5,000.—*Massachusetts Ben. Ass'n v. Miles*, U. S. S. C., 11 S. C. Rep 234.

5. APPEAL—Jurisdictional Amount.—Where in an action for damages for breach of contract, defendant counter-claims in the sum of $6,000 for an alleged breach by plaintiff and plaintiff recovers judgment for $2,485, the supreme court has jurisdiction of an appeal by defendant, although the record discloses no evidence sustaining his counter claim.—*Sire v. Ellithorpe Air-Brake Co.*, U. S. S. C., 11 S. C. Rep. 195.

6. APPEAL—Jurisdictional Amount.—Where one of six legatees, entitled under the will to equal shares in the residuary estate, files a bill against her co legatees to compel them to pay to the executor $5,377.83 which they claim by gift *inter vivos* from the testatrix, the supreme court has no jurisdiction of an appeal by plaintiff, as her interest only amounts to one sixth of the sum in controversy, or $896.30 1-2.—*Miller v. Clark*, U. S. S. C., 11 S. C. Rep. 300.

6. APPEAL—Writ of Error.—Proceedings in error must be commenced in the supreme court within one year from the date of the rendition of the judgment sought to be reversed, without regard to the time when the motion for a new trial was passed upon.—*Phenix Ins. Co. v. Swantkowski*, Neb., 47 N. W. Rep. 917.

8. APPEALABLE JUDGMENTS—Condemnation.—In condemnation proceedings, where the right to condemn is contested, a judgment for condemnation is final, though the compensation is still to be determined by commissioners appointed to estimate it; and appeal lies from such judgment.—*Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, U. S. S. C., 11 S. C. Rep. 301.

9. ARMY AND NAVY—Discharged Privates.—A private the marine corps, discharged without court-martial as unfit for service," and of bad character, is not entitled to the retained pay allowed by Rev. St. U. S. § 1281, to a soldier upon his discharge, but which "shall be forfeited unless he serves honestly and faithfully to the date of his discharge."—*United States v. Kingsley*, U. S. S. C., 11 S. C. Rep. 286.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A court of equity may presume fraud, and declare an assignment purporting to be for the benefit of creditors fraudulent from the character and conduct of the assignee appointed by the debtor.—*White v. Davis*, N. J., 21 Atl. Rep. 187.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An instruction that if, before the assignment was fully executed by the assignee filing bond and making an inventory, the assignor and assignee assented to the appointment of a receiver for the purpose of making dispositions of the property in a mode not contemplated by law, in such cases it was a fraud upon the assignment law, and would sustain an attachment, if it interfered with the rights of creditors, is properly refused.—*Lowenstein v. Finney*, Ark., 15 S. W. Rep. 153.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS—Assignee's Allowances.—An assignee under a void assignment for the benefit of creditors should be allowed for all necessary disbursements.—*T. T. Haydock Carriage Co. v. Pier*, Wis., 47 N. W. Rep. 945.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS—Claims.—Under Code Iowa, § 2126, the failure to present claims within the required time will bar the creditor, notwithstanding he is a non-resident, and had no actual notice of the assignment.—*Carter v. Lee*, Iowa, 47 N. W. Rep. 1014.

14. ASSIGNMENT OF PATENT.—A patentee assigned to a firm of which he was a member all his interest in the patent "for their full, free and exclusive use during the life of the copartnership." Said firm assigned to another firm, of which the patentee was also a member, all the assests of the former firm, and agreed that during the existence of the second firm no right to manufacture or sell under said patent should be given to any third person. *Held*, that the second firm only acquired the use of the patent during the existence of such firm.—*Nichols v. Murphy*, Ill., 26 N. E. Rep. 509.

15. ASSUMPSIT—Money Had and Received.—Where two companies employ a common agent to make sales, and he transfers to one, in payment of his account, notes taken by him for goods sold for the other, and *vice versa*, the company that has received an excess of the other's notes, both being ignorant of the agent's duplicity is liable to the other to the extent of such excess.—*Ackerman v. Cobb Lime Co.*, N. Y., 26 N. E. Rep. 455.

16. ATTACHMENT—Defenses.—Where a sheriff attaches property found in the possession of a stranger to the suit, claiming title, in an action of replevin therefor by such stranger, the officer, in order to justify the seizure, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued.—*Paxton v. Moravek*, Neb., 47 N. W. Rep. 919.

17. ATTACHMENT OF MORTGAGED CHATTELS—Evidence.—Where an attachment suit is brought in a wrong county, a levy thereunder gives no rights as against a mortgagee of the attached property, even though the attaching creditor has no notice, actual or constructive, of the mortgage, when the levy is made.—*Haller v. Parrott*, Iowa, 47 N. W. Rep. 996.

18. ATTORNEY AND CLIENT—Purchase of Claims—Trust.—Where a debtor, wishing to compromise her liabilities, has her husband, as her agent, consult an attorney, with reference to getting control of the executions against her, and he unfolds to the attorney the entire scheme of compromise, the attorney cannot purchase the executions at a discount for his own benefit, but will be held a trustee of them for the debtor.—*Larey v. Baker*, Ga., 12 S. E. Rep. 684.

19. BAIL-BOND—Recital of Crime.—The omission of a bail-bond to specify the crime for which the bail is given does not release the surety, since his substantial rights are not prejudiced by such omission.—*People v. Gillman*, N. Y., 26 N. E. Rep. 469.

20. BAILMENT—Negligence.—In an action against private bankers to recover the value of bonds placed with them as a special deposit, and stolen by an absconding cashier, it was held under the facts, that having become aware of the character of the cashier, the retaining him in his position was gross negligence, and defendants were liable, whether regarded as gratuitous bailees or bailees for hire.—*Preston v. Prather*, U. S. S. C., 11 S. C. Rep. 162.

21. BANKRUPTCY—Sale of Land—Notice to Purchaser—Quieting Title.—Where the petition for an order of sale of a bankrupt's title to land states that the land has not been scheduled as part of the bankrupt's estate, and that the deed through which the bankrupt derived title is a cloud upon the title of the owners, who are in possession, and who have offered to pay for the bankrupt's title enough to cover all expenses of the sale, and there is at that time on record a deed of the land from the bankrupt, made after the adjudication of bankruptcy, these facts are sufficient to put the purchaser at such sale on inquiry whether the bankrupt held title for himself, or as trustee for others.—*Weber v. Herrick*, Ill., 26 N. E. Rep. 860.

22. BANKS—Deposits.— Even when it is known that the money deposited is held by the depositor as a trustee, the bank is bound to presume, in the absence of knowledge to the contrary, that a check drawn by the depositor against the money has been drawn by him in the proper discharge of his duty as trustee, and to pay the check accordingly.—*Board of Chosen Freeholders v. Newark City Nat. Bank*, N. J., 21 Atl. Rep. 185.

23. BANKS AND BANKING—Collection.—Upon the facts *held*, that the lower court was justified in finding that the note herein had been left with the cashier for collection in his individual capacity and not as agent of the bank.—*McLeney v. Bank*, Cal., 25 Pac. Rep. 760.

24. BILL OF EXCEPTIONS—Signing.—A bill of exceptions must be authenticated by the judge before whom the cause was tried, or, in case of agreement, by the clerk of the district court; and the judge has authority, under the statute, after the expiration of his term of office, to sign such bill.—*Quick v. Schasse*, Neb., 47 N. W. Rep. 935.

25. BILL OF EXCEPTIONS—Time for Presentation.—Where a bill of exceptions is deposited in an express office on the last day granted for presenting it to the judge, but is not received by him until the following day, the bill is presented too late, since the express company is the agent of the appellant, and not of the judge.—*Village of Marseilles v. Howland*, Ill., 26 N. E. Rep. 495.

26. BOUNDARIES — Acquiescence — Estoppel. — The owners of a strip of land, on the boundary between themselves and defendant, are not estopped from asserting their title, after disputing defendants' right to enter thereon, because, misled by defendants' claim and some advice they had obtained in reference thereto, they acquiesced for less than 20 years in the possession of defendants, who did nothing in reliance on their silence.—*Hinkley v. Crouse*, N. Y., 26 N. E. Rep. 452.

27. BOUNDARIES — Recognition. — Where adjoining land-owners employ a surveyor to run the boundary line between them, not because they had a dispute about it, but merely because they are ignorant of its exact location, the line so run, if incorrectly located, is not conclusive on the parties, even though they acquiesce in it believing it to be correct.—*Pickett v. Nelson*, Wis., 47 N. W. Rep. 936.

28. CARRIERS—Live Stock.—Where contract for car stipulated for slatted doors and the plaintiff thereafter signed a stipulation accepting a car without such doors and the animals therein perished from suffocation: *Held*, that suffocation for want of ventilation was not one of the risks assumed when the shipper signed the contract.—*Kan., etc. R. Co. v. Holland*, Miss., 8 South. Rep. 516.

29. CARRIERS—Passengers.—In an action against a carrier for personal injuries to a passenger, where the negligence charged is that defendant carelessly and improperly managed its locomotive, and failed to provide suitable platform and railing for the safety of its passengers, a rule of defendant forbidding trains and engines to pass between a station and a passenger train which is receiving or discharging passengers is admissible in evidence.—*Lake Shore & M. S. R. Co. v. Ward*, Ill., 26 N. E. Rep. 520.

30. CARRIERS OF LIVE STOCK—Contract.—In an action against a railroad company for failure to furnish cars for the shipment of live stock, the court instructed that if the jury believed that plaintiffs contracted with defendant's agent to furnish the cars at a certain time and place, and that the agent had authority to make such contract, and that defendant failed to receive and ship the cattle as agreed to plaintiffs' damage, they must find for plaintiffs: *Held*, not error.—*McCarty v. Gulf, etc. Ry. Co.*, Tex., 15 S. W. Rep. 164.

31. CHARITABLE USE.—A conveyance of land to trustees for a charitable use does not create a conditional estate, but only a trust for the charitable use, not liable to be defeated by non-use or alienation, in the absence of express conditions.—*In re Sellers Chapel Methodist Church of Braddock*, Penn., 21 Atl. Rep. 145.

32. CHATTEL MORTGAGE ASSIGNMENT.—The instrument herein *held*, a chattel mortgage and not an assignment for the benefit of creditors, with preferences within the act of Texas, March 24, 1879, as construed by the courts of that State.—*Regan v. Aikin*, U. S. S. C., 11 S. C. Rep. 283.

33. CLERK OF PROBATE COURT — Salaries. — Under Const. Ill. art. 9, § 11, the salary of the clerk of a probate court, whose term of office is fixed at four years by the act establishing probate courts, cannot be increased during his term of office.—*Cook County v. Sennott*, Ill., 26 N. E. Rep. 491.

34. COMPROMISE.—A compromise is a contract, and, to have the force of things adjudged, it must be perfect and complete in itself, and nothing left for ascertainment by parol proof.—*Lampkins v. Vicksburg, S. & P. R. Co.*, La., 8 South. Rep. 530.

35. COMPROMISE OF LITIGATION—Matters Included.—Where an effort is made to compromise litigation upon two bills and two cross-bills setting up various conflicting claims, all growing out of a connected series of transactions, and from the whole course of the negotiations, embracing various propositions and counter-propositions, it appears that the parties intended to include all matters of difference between them, the compromise ultimately reached will be held to embrace all the claims, though one claim was not specially mentioned in the proposition that was accepted.—*Coburn v. Cedar Valley Land & Cattle Co.*, U. S. S. C., 11 S. C. Rep. 258.

36. CONSTITUTIONAL LAW—Depositaries of Public Moneys.—The charter of Los Angeles, § 44, directing the city council to appoint as a depositary of the public moneys, the bank offering the highest rate of interest therefor, and the treasurer to deposit the city funds there daily, is void, being inconsistent with Const. Cal. art. 11, §§ 13, 16, 17.—*Yarnell v. City of Los Angeles*, Cal., 25 Pac. Rep. 767.

37. CONSTITUTIONAL LAW — Due Process—Embezzlement by Attorney.—How. St. Mich. § 9151, denounces the crime of embezziement generally. § 9152, provides for the punishment of an attorney at law who collects money belonging to another and fails to pay it over. Petitioner was arraigned under the former section and pleaded guilty as an attorney at law. Upon sentence and writ of error the Supreme Court of Michigan affirmed the judgment on the ground that an attorney was the agent within the meaning of § 9151: *Held*, that petitioner had the benefit of due process of law and could not be released upon *habeas corpus*.—*Ex parte Converse*, U. S. S. C., 11 S. C. Rep. 191.

38. CONSTITUTIONAL LAW—Due Process of Law.—A general statute (Act March 26, 1881; Laws Tex. 1881, p. 60 *et seq.*) authorizing a simplified form of indictment for murder is not contrary to the fourteenth amendment, as depriving a person convicted under an indictment, in the form prescribed, of life, etc., "without due process of law," for the technical sufficiency of the indictment is a question within the jurisdiction of the State courts.—*Caldwell v. State of Texas*, U. S. S. C., 11 S. C. Rep. 224.

39. CONSTITUTIONAL LAW — Due Process of Law—Special Appearance.—Rev. St. Tex. arts. 1240-1245, providing, as construed by the Supreme Court of Texas, that a defendant who appears specially to object to the insufficiency of the service of process upon him is thereafter subject to the jurisdiction of the court, though the service is insufficient, are valid, and not in conflict with Const. U. S. 14th Amend., forbidding the deprivation by any State of a person's life, liberty, or property without due process of law.—*Kaufman v. Wooters*, U. S. S. C., 11 S. C. Rep. 298.

40. CONSTITUTIONAL LAW—Obligation of Contract—Franchise.—The fact that a street-railway company constructed its track under a franchise granted by a

city does not exempt the company from the power reserved to the general assembly by Code Iowa, § 1090, of imposing any conditions on the franchise of a corporation which it deems necessary for the public good; and hence, though the original franchise granted by the city required the company to pave only the space inside the rails, the obligation of the contract is not impaired by a subsequent ordinance passed by the city in pursuance of Act Iowa, March 15, 1894, requiring the company to pave, in addition, one foot outside of each of the rails.—*Sioux City St. Ry. Co v. City of Sioux City*, U. S. S. C., 11 S. C. Rep. 226.

41. CONTEMPT—Attorney—Evidence.—A proceeding against an attorney as an officer of the court for contempt is a proceeding for a criminal offense, and the same principles of evidence apply as in other criminal trials, and the guilt of the respondent must be proved beyond a reasonable doubt.—*State v. Ralphsynder*, W. Va., 12 S. E. Rep. 721.

42. CONTINUANCE—Absent Witness.—No continuance can be had for the absence of a witness who has been convicted and sentenced for a felony, where it is admitted that no evidence would be offered to remove his disability.—*Tillman v. Fletcher*, Tex., 15 S. W. Rep. 161.

43. CONTRACT—Delivery.—An instrument absolute, unconditional and irrevocable on its face to be effective against the party executing it must be accompanied with actual delivery for the purpose for which it was made.—*National Refining Co. v. Miller*, S. Dak., 47 N. W. Rep. 962.

44. CONTRACT—Sunday.—A contract for services in looking up lands in a distant State, paying taxes, making sales, etc., which states that as compensation the employee is to receive two dollars a day "for every day consumed in said services, dating from the day he started, * * * until his return, Sundays and all," is not invalid as requiring services not of charity or necessity to be rendered on Sunday.—*Alfree v. Gates*, Iowa, 47 N. W. Rep. 993.

45. CONTRACT OF SALE—Subsequent Modifications.—Where a written contract for the sale of a chattel stipulates that the purchaser is to pay $25 before delivery, and to give his notes for the balance, but afterwards the purchaser declines to receive the article except upon 10 days' trial, with the right to return it if unsatisfactory, and the seller agrees to this, the purchaser's rights are fixed by the modified, not the original, contract.—*McGregor v. Bensinger Self Adding Register Co.*, Ga., 12 S. E. Rep. 683.

46. CORPORATIONS—Action.—The trustee of a foreign corporation, appointed by the court of another State, is not authorized, upon the ground of comity, to maintain an action in the State of Iowa for work done and materials furnished in that State.—*Ayres v. Seibel*, Iowa, 47 N. W. Rep. 989.

47. CORPORATIONS—Knowledge of Officers.—A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction.—*Keohler v. Dodge*, Neb., 47 N. W. Rep. 918.

48. CORPORATIONS — Stockholders. — Construction of Const. Cal. art. 12, § 3, providing that a stockholder of a corporation shall be personally liable for such proportion of all its debts contracted while he was a stockholder as the amount of shares owned by him bears to the whole of the subscribed capital stock.—*Bidwell v. Babcock*, Cal., 25 Pac. Rep. 752.

49. CRIMINAL EVIDENCE—Larceny—Accessory.—Comp. Laws Utah, § 5049, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence, does not require that the testimony of an accessory after the fact shall be corroborated, in order to sustain a conviction, since sections 4391 and 4349 make a clear distinction between an accomplice and an accessory after the fact.—*People v. Chadwick*, Utah, 25 Pac. Rep. 737.

50. CRIMINAL LAW—Abatement.—Where judgment is rendered in favor of the defendant in a crimin l acase on plea in abatement, it is proper to direct that he be retained in custody until a new information can be prepared.—*Rowland v. State*, Ind , 26 N. E. Rep. 485.

51. CRIMINAL LAW—Assault with Intent to Kill—Lesser Offense.—Where an indictment simply charges defendant with an assault with a slung-shot with intent to kill, under Rev. St. 1879, § 1263, and makes no allegation of the infliction of an injury, the defendant is not bound to look beyond the indictment; and a conviction under section 1264 for "wounding, maiming, and disfiguring" is not authorized by section 1655, providing that upon an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a lesser crime.—*State v. Melton*, Mo., 15 S. W. Rep. 139.

52. CRIMINAL LAW—Homicide — Charivari.— Where a *charivari* party surrounds a person's house on three different nights, firing pistols, shouting, and blowing horns, and the owner of the house on the first night warns them to desist, he is not bound on the third night to inform them that their riotous conduct is endangering the lives of his wife and children, before firing into the crowd.—*Higgins v. Menaghan*, Wis., 47 N. W. Rep. 941.

53. CRIMINAL LAW—Murder.—The intent to kill is an essential element of murder in the second degree, and where the court has told the jury in one instruction that if they find that defendants willfully, premeditatedly, and with malice aforethought, but without deliberation, cut and stabbed deceased with a knife, which was a deadly weapon, and thereby killed him, they must find them guilty of murder in the second degree, it is error to give another instruction to the effect that from the simple act of killing with a deadly weapon the law presumes that it was done intentionally, premeditatedly, and with malice aforethought.—*State v. McKenzie*, Mo., 15 S. W. Rep. 149.

54. CRIMINAL LAW—Murder.—When a prisoner confined in the county jail for a misdemeanor, when the door is temporarily open, presents a loaded and cocked pistol at the sheriff, his lawful custodian, demanding to be permitted to pass out, his attempt to escape is a felony, under Rev. St. Mo. § 3702, and the sheriff has a right to oppose force to force, and if necessary to prevent the escape, to kill the prisoner, and the fact that he immediately fires upon him will not justify the latter in killing the sheriff.—*State v. Turlington*, Mo., 15 S. W. Rep. 141.

55. CRIMINAL LAW—Principal and Accessory.— Under Rev. Stat. Mo. 1889, § 3944, an indictment for murder charging that one defendant shot and killed deceased, and that the other advised and incited him to do the act, and concluding by alleging that both killed and murdered deceased, is not objectionable as being contradictory.—*State v. Stacy*, Mo., 15 S. W. Rep. 147.

56. CRIMINAL LIBEL—What Constitutes.—A libel that was criminal at common law, but which is not enumerated in Act Mich. No. 192, Laws 1879 (How. St. Mich. § 9315), cannot be punished, since that act enumerating criminal libels and specifying the punishment excludes as offenses those not mentioned.—*Glassmire v. Manistee*, Mich., 47 N. W. Rep. 965.

57. CRIMINAL PRACTICE—Larceny.—Where an indictment for larceny lays the ownership of the property in one, and the proof shows that it belongs to two, there can be no conviction.—*McDowell v. State*, Miss., 8 South. Rep. 508.

58. CRIMINAL PRACTICE—LARCENY—Receiving Stolen Goods.—An indictment charging, in one count, one defendant with larceny of three hogs, and another defendant, in another count, with having received same three hogs, knowing them to have been stolen property, a verdict and judgment acquitting the defendant of the charge of larceny necessitates the discharge of the other defendant.—*State v. Antoine*, La., 8 South. Rep. 529.

59. CRIMINAL PRACTICE—Res Judicata.—Where a court has erroneously rendered judgment against defendant in a criminal case pending a motion for new trial, and after the motion is determined he is imprisoned on execution issued thereon for failing to pay a fine, but subsequently released on a writ of *habeas corpus*, such illegal sentence and imprisonment fall within the provision of Rev. St. 1879, § 2670 (Rev. St. 1889, § 5398).—*State Schierhoff*, Mo., 15 S. W. Rep. 151.

60. CRIMINAL PRACTICE — ROBBERY—Indictment.—An indictment charging that the accused did willfully and feloniously, by force and violence, rob, etc., is sufficient without the additional words, "against his will."—*State v. Patterson*, La., 8 South. Rep. 529.

61. DEDICATION — Streets — Obstruction — Practice.—Under Rev. St. Ill. 1845, ch. 25, div. 1, §§ 17-21, which provided for the recording of plats acknowledged by the owner of the land, the recording of a plat acknowledged by the attorney in fact of such owner does not operate as a statutory dedication of the streets.—*Earll v. City of Chicago*, Ill., 26 N. E. Rep. 870.

62. DEEDS—Acknowledgment.—Sufficiency of a deed, defectively acknowledged, to pass the title to real property, as between the parties. — *Lydard v. Chute*, Minn., 47 N. W. Rep. 967.

63. DEEDS—Conditions Subsequent.—A lot adjoining a church was conveyed to the church trustees, "to be used as a parsonage lot or church purpose, and no other." The lot remained uninclosed, but was used by persons attending service to hitch their horses upon: *Held*, that this was a church purpose, within the meaning of the deed.—*Bailey v. Wells*, Iowa, 47 N. W. Rep. 988.

64. DEED—Consideration—Agreement to Support.—An agreement to maintain and support another is a valuable consideration, and will sustain a transfer of property.—*Keener v. Keener*, W. Va., 12 S. E. Rep. 729.

65. DEED—Delivery.—Under the evidence herein *held*, to show a delivery of the deed.—*Loveland v. Loveland*, Ill., 26 N. E. Rep. 381.

66. DEEDS—Exceptions.—Under a grant by the city of New York of a water lot described by metes and bounds, "excepting, however, so much of the said above-described premises as is required for the streets hereinafter mentioned to be made, the fee to the excepted streets to be constructed through the granted premises remains in the city.—*Mayor, etc. of City of New York v. Law*, N. Y., 26 N. E. Rep. 471.

67. DEED—Reformation.—Upon the facts held that plaintiff was entitled to have the deed herein reformed so as to include 12 acres which by wrong survey was cut out.—*Cordes v. Coates*, Wis., 47 N. W. Rep. 949.

68. DEED—Undue Influence.—The evidence herein failed to show incapacity or undue influence.—*Brockway v. Harrington*, Iowa, 47 N. W. Rep. 1013.

69. DESCENT AND DISTRIBUTION — Illegitimate Children—Mormons.—Act Utah 1852, § 25, permitting illegitimate children to inherit from the father, was not abrogated by Act Cong. July 1, 1862, annulling all acts passed by the legislature of Utah territory, "which establish, support, maintain, shield, or countenance polygamy," since polygamy is neither established, maintained, nor countenanced by permitting illegitimate children to inherit from the father.—*Cope v. Cope*, U. S. S. C., 11 S. C. Rep. 222.

70. DISMISSAL OF SUIT—Costs.—Where an administrator is removed for failure to file his bond, an action by him as such administrator is properly dismissed where no appeal is taken from such order of removal.—*Cuppy v. Cofman*, Iowa, 47 N. W. Rep. 1005.

71. DISTRESS—Redelivery Bond.—Though a bond given to release property taken under a distress warrant is not conditioned, as required by statute, it is good as a common-law obligation, where it provides that if defendants are condemned in the suit they will return the property, or its value, to satisfy the judgment that may be rendered against him.—*Jacobs v. Daugherty*, Tex., 15 S. W. Rep. 160.

72. DIVORCE—Prior Marriage—Alimony.—A marriage occurring while section 1, ch. 109, Code Va. 1860, was in force, between persons, one of whom had a husband then living, is absolutely void without decree. It conferred no right to alimony.—*Stewart v. Vandervort*, W. Va., 12 S. E. Rep. 736.

73. DOWER—Assignment.—*Held*, that the probate record was conclusive herein that dower had been assigned in all the lands and on a subsequent writ of dower parol evidence was inadmissible that the land sold by the administrator was not included in the appraisal by the commissioners and was not considered by them in assigning the dower.—*Fuller v. Rust*, Mass., 26 N. E. Rep. 410.

74. DURESS—Compounding Felony.—Threats of criminal prosecution, made to a brother, and by him at plaintiff's request communicated to his sister in order to secure her signature to a note to compound the felony constitute duress of the sister, for which she may avoid the note.—*Schultz v. Catlin*, Wis., 47 N. W. Rep. 946.

75. EASEMENTS—Creation.—Representations made by the vendor of land, that an adjoining lot, which he has previously contracted to sell to a third person, shall be kept free from buildings, are insufficient to create an easement in said lot in favor of the vendee.—*Tinker v. Forbes*, Ill., 26 N. E. Rep. 503.

76. EJECTMENT — Instructions — Mortgage.—In ejectment where plaintiff claims title through a former owner of the land who had mortgaged it by a deed, absolute on its face, and defendant is a mere intruder, it is reversible error to charge that an abandonment of the land by the mortgagor, with no intention of returning or of paying the mortgage debt, would leave the mortgagee the only one entitled to the land.—*McCormick v. Herndon*, Wis., 47 N. W. Rep. 939.

77. ELECTION LAWS.—*Held*, that illegal voting at a village election is not punishable under the provisions of sections 181 and 182 of the Criminal Code.—*State v. Chichester*, Neb., 47 N. W. Rep. 934.

78. ELECTIONS — Contest — Jurisdiction of County Courts.—Under Rev. St. Ill. 1889, ch. 46, § 98, and Laws 1889, ch. 122, art. 3, § 13, the county court had jurisdiction of a contest over the election to the office of president of the board of education of a school-district.—*Misch v. Russell*, Ill., 26 N. E. Rep. 528.

79. EMINENT DOMAIN—Compensation.—Where a railroad company enters upon and appropriates land for a right of way without consent of the owner, or by proper legal proceedings, it becomes a trespasser, and will not be relieved of liability therefor by subsequent proceedings to secure a right of way.—*Canton, etc. R. Co v. French*, Miss., 8 South. Rep. 512.

80. EMINENT DOMAIN—Mortgagee as Party.—Where by mistake a mortgagee is not made a party defendant to a proceeding to condemn part of the mortgaged land for railroad purposes, and the railroad company does not discover the existence of the mortgage until after it has condemned the land, built its road thereon, and paid the compensation therefor to the county treasurer for the benefit of the owner, the company may, by bill in equity, restrain the payment of such compensation to the mortgagor, and have it paid to the mortgagee, to be applied on the mortgage debt.—*Calumet River Ry. Co. v. Brown*, Ill., 26 N. E. Rep. 501.

81. ERROR—Writ of—By Whom Issued.—Since Const. Colo. art. 6, § 8, provides that the judge of the supreme court having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and, in case of his absence, the judge having in like manner the next shortest term to serve shall preside in his stead, the allowance of a writ of error by one of the associate justices of that court, wherein he recites the absence of the chief justice, and styles himself the presiding justice, is a sufficient compliance with Rev. St. U. S. § 999, which provides for the issuance of writs of error by the chief justice of the court rendering the judgment, or by a justice of

the Supreme Court of the United States.—*Butler v. Gage*, U. S. S. C., 11 S. C. Rep. 235.

82. EVIDENCE.—Where part of a letter has been admitted in evidence, over the objection of one of the parties, such party has a right to introduce the rest of the letter in evidence.—*Glover v. Stevenson*, Ind., 26 N. E. Rep. 486.

83. EXECUTION—Misrecital.—A misrecital is an execution as to the amount of the judgment is an irregularity merely, and does not render the execution void; and, in an action against the sheriff for his failure to enforce the execution, it may be amended so as to conform to the judgment.—*Bachelder v. Chaves*, N. Mex., 25 Pac. Rep. 783.

84. EXECUTION—Supplementary Proceedings.—In proceedings auxiliary to execution under Code Iowa, §§ 3135-3140, an order may be made upon a third person, not a party to the judgment, to turn over property of the judgment debtor in his possession, but such order is for the protection of such third party if he elects to pay, and disobedience thereto cannot be punished as for a contempt under Code, § 3145.—*Estey v. Fuller Implement Co.*, Iowa, 47 N. W. Rep. 1025.

85. EXECUTION—Supplementary Proceedings.—Under Code Iowa, § 3140, the court has no authority to make an order for the delivery of property where it is visible, and can be levied on in the ordinary way.—*Reardon v. Henry*, Iowa, 47 N. W. Rep. 1022.

86. EXECUTORS—Ancillary—Non-resident Creditors.—A foreign executor who, under Code Civil Proc. N. Y. § 2695, who has taken out ancillary letters in New York, may be sued in the courts of that State by a non-resident creditor of the testator.—*Hopper v. Hopper*, N. Y., 26 N. E. Rep. 457.

87. EXPERT TESTIMONY—Opinion Evidence.—Witness herein not permitted to state to the jury that a platform upon which plaintiff fell and broke her leg was dangerous in their opinion as the condition of the same could be plainly shown.—*Graham v. Pa. Co.*, Pa., 21 Atl. Rep. 151.

88. EXPERT TESTIMONY — Opinion Evidence — Attorney's Fee.—In a suit by an attorney for compensation for legal services for which there is no customary or established charge, attorneys testifying as experts may state what such services are reasonably worth.—*Louisville, etc. R. Co. v. Wallace*, Ill., 26 N. E. Rep. 493.

89. FEDERAL COURTS — Jurisdiction. — Act Cong. March 3, 1887, does not deprive federal courts of jurisdiction of an action by an assignee to recover damages for a trespass in entering upon lands and cutting down trees.—*Ambler v. Eppinger*, U. S. S. C., 11 S. C. Rep. 173.

90. FEDERAL COURTS—Jurisdiction.—A foreign banking corporation can sue in the circuit court of the United States sitting in California, notwithstanding its failure to comply with St. Cal. 1876, p. 729, requiring every corporation to record each year a sworn statement of its capital, assets, etc., and prohibiting any corporation that fails to comply with the law from suing in the State courts.—*Bank of British North America v. Barling*, U. S. C. C. (Cal.), 44 Fed. Rep. 641.

91. FEDERAL COURTS — Jurisdiction. — An acceptance by a city of an order drawn on it by a city contractor directing the payment of a specified sum to the payees on the completion of the work to be charged to the contract price constitutes a new contract between the city and the payees, and is not the assignment of a negotiable instrument or chose in action within the meaning of act August 13, 1888, § 1.—*City of Superior v. Ripley*, U. S. S. C., 11 S. C. Rep. 288.

92. FEDERAL COURTS—Jurisdiction.—The district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock.—*Stephens v. Bernays*, U. S. C. C. (Mo.), 44 Fed. Rep. 642.

93. FEDERAL COURTS— Jurisdiction. — The fact that Act Cong. March 1, 1889, gives the federal court jurisdiction of crimes committed on the public land strip before its passage renders it unconstitutional as in violation of Const. U. S. art. 3, § 2, providing that trial of crimes shall be at such place or places as congress "may by law have directed."—*Cook v. United States*, U. S. S. C., 11 S. C. Rep. 268.

94. FEDERAL COURTS—Jurisdiction.—Under the judiciary act of 1789, § 16, declaring that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy can be had at law," a bill to quiet title to lands against a person in possession cannot be sustained in the United States courts, although brought under Code Iowa, § 3273, which expressly authorizes such an action.—*Whitehead v. Shattuck*, U. S. S. C., 11 S. C. Rep. 276.

95. FIXTURES—Mortgagor and Mortgagee.—The facts that shelving and counters in a store are nailed to the building, that they are necessary for the use of the premises as a store, and have been so used for 20 years, do not constitute them part of the realty as between mortgagor and mortgagee, where there is no evidence as to the intention of the owner of the building to treat them as fixtures.—*Johnson v. Moser*, Iowa, 47 N. W. Rep. 996.

96. FORECLOSURE—Prior Action Pending.—Where the plaintiff in a foreclosure suit unites with his prayer for foreclosure and sale one for a deficiency judgment, as allowed by Rev. St. § 3156, such suit, while pending, is a bar to an action at law on the mortgage debt.—*Witter v. Neeves*, Wis., 47 N. W. Rep. 938.

97. FORECLOSURE BY ADVERTISEMENT — Notice.—The provision of section 5, ch. 81, Gen. St., that on foreclosure by advertisement the copy of notice of sale "shall be served in like manner as summons in civil actions in the district court," has reference merely to the mode of making the service, and not to the person by whom it may be made.—*Kirkpatrick v. Lewis*, Minn., 47 N. W. Rep. 970.

98. FRAUDULENT CONVEYANCE—Pleading.—In a suit by a creditor to set aside, as fraudulent, a transfer of personal property by his debtor, a complaint which fails to state that the debtor was insolvent is demurrable.—*Shew v. Hews*, Ind., 26 N. E. Rep. 483.

99. FRAUDULENT CONVEYANCES—Secret Reservation.—Where real estate was transferred to a creditor by a partnership in payment of its debt, and it was orally agreed that one of the partners, who resided on the land at the time of the transfer, should remain thereon without payment of rent, for the purpose of caring for cattle of the creditor, there is no secret reservation to the grantor of the use and benefit of the land such as to impeach the conveyance for fraud.—*Strang v. Swafford*, Iowa, 47 N. W. Rep. 1023.

100. GAMING CONTRACTS — Options.—A contract entered into in the State of Illinois for the purchase of 150 cars of coal at a fixed price, to be delivered within certain dates, with the privilege of ordering an additional 250 cars on the same terms, is separable, and, as to the part relating to the privilege of purchasing, is a contract for an option to buy at a future time, designed for the benefit of the vendees, and is void, under Crim. Code Ill. § 130.—*Osgood v. Bauder*, Iowa, 47 N. W. Rep. 1001.

101. GOODS SOLD.—In an action for goods sold and delivered to one claimed to be defendant's son and his agent, where evidence of the opinion in the neighborhood as to the fact of the relationship was admitted, it is error to exclude defendant's testimony that such person was not his son, and had never been so recognized by him.—*Sax v. Davis*, Iowa, 47 N. W. Rep. 990.

102. GUARDIAN—Accounting.—The wards of a guardian had money coming to them under a will, which made their deceased father a trustee for them, and, in the event of his death, provided for the appointment of a trustee by some proper court. The guardian was appointed trustee by the probate court: *Held*, that his appointment as trustee was inoperative, and he held the money as guardian.—*Prince v. Ladd*, Tex., 15 S. W. Rep. 159.

103. HOMESTEAD.—The words "within the laid-out or

platted portion" of a municipal corporation, found in section 1, ch. 68, Gen. St. 1878, relating to homestead exemptions, construed: *Held*, that a tract of land to be within the laid out or platted portion of such corporation must itself be laid out or platted, or that its owner must have performed acts with reference to it, which are equivalent to a laying out or platting.—*Mintzer v. St. Paul Trust Co.*, Minn., 47 N. W. Rep. 973.

104. HOMESTEAD—Mortgage.—Where the holder of a homestead right, for a consideration, joins in a mortgage with the owner of the fee, and "relinquishes and conveys all right of homestead" therein, he thereby terminates his homestead right, and the mortgage will be valid.—*Small v. Wicks*, Iowa, 47 N. W. Rep. 1031.

105. HUSBAND AND WIFE—Separate and Community Property.—The husband cannot reconvene for claims of the community, and obtain judgment during the existence of the community, where she sues for the resumption of the control and administration of her paraphernal property.—*Smith v. Reddick*, La., 8 South. Rep. 539.

106. INSURANCE—Conditions of Policy.—The execution of a mortgage on insured property is a breach of a condition that the policy shall be void if any change takes place in the "interest" of the assured, "whether by sale, transfer or conveyance."—*East Tex. Fire Ins. Co. v. Clarke*, Tex., 15 S. W. Rep. 166.

107. INSURANCE—Proof of Loss.—Where the insurer, in response to notice of loss, sent to the insured a blank, apparently designed to be used in making proof of loss, and the insured so used it, filling it up with all the particulars of the loss of which the blank admitted, and sent it to the insurer, who returned it without objecting to its sufficiency, the insurer will be held to have waived the objection that it was not itemized with the detail required by the policy.—*Bromberg v. Minneapolis Fire Ass'n*, Minn., 47 N. W. Rep. 975.

108. INSURANCE COMPANIES—Prosecution.—Under Act April 26, 1887, supplemental to Act April 4, 1873, relative to foreign insurance companies, the owner may insure his own property in an unauthorized foreign company without incurring the penalty of the statute.—*Commonwealth v. Biddle*, Pa., 21 Atl. Rep. 134.

109. INTOXICATING LIQUORS—Criminal Prosecution.—An affidavit on which is based a warrant for the violation of certain whisky sections of an ordinance, which quotes the sections, but fails to state in what manner they were violated, is defective.—*Mayor v. Alexander*, Ga., 12 S. E. Rep. 681.

110. INTOXICATING LIQUORS — License — Discretion.—Under the law relating to the sale of liquors, in Code Miss. 1880, providing that the town authorities may grant a license upon a petition signed by a majority of the voters, the authorities are not bound to grant the license, though all the provisions of the law be complied with by the petitioner.—*Perkins v. Ledbetter*, Miss., 8 South. Rep. 507.

111. INTOXICATING LIQUORS—Informer's Right to Penalty.—Under Code Iowa, § 1539, an informer who sues for the penalty is entitled to one-half of the amount paid by defendant to compromise the action.—*Hull v. Welsh*, Iowa, 47 N. W. Rep. 982.

112. INTOXICATING LIQUORS—License.—Under 1 Comp. Laws Utah 1888, § 1755, subd. 40, it is competent for the council in its discretion to refuse a license notwithstanding the applicant has complied with the ordinance in respect to the petition, bond, etc., and no previous ordinance has specified the persons to whom, nor places where licenses may be granted.—*Perry v. City Council of Salt Lake City*, Utah, 25 Pac. Rep. 739.

113. INTOXICATING LIQUORS—Original Packages.—Pub. St. Mass. ch. 100, strictly forbidding the sale of intoxicating liquor, is not wholly unconstitutional because it contains no express exception in favor of liquors imported in original packages from other States.—*Commonwealth v. Gagne*, Mass., 26 N. E. Rep. 449.

114. JUDGMENT—Collateral Attack.—Defendant sued by publication a non-resident devisee of an undivided interest in land, levied an attachment, sold the same and bid it in himself. Plaintiff, the administrator of the estate, under an order of the court sold the lands to pay debts. Due notice of the application was given to all the parties interested except defendant, on whom no service was attempted. Plaintiff then sued to cancel the conveyance to defendant as a cloud on the title: *Held*, that defendant, having only the rights of the devisee, cannot make a collateral attack upon the validity of the order of sale in a collateral proceeding.—*Spurgin v. Bowers*, Iowa, 47 N. W. Rep. 1029.

115. JUDGMENT — Default—Setting Aside.—The provisions of section 4939, Comp. Laws, conferring upon courts the power to "relieve a party from a judgment * * * taken against him through his mistake, inadvertence, surprise or excusable neglect," are liberal in their terms, remedial in their character, and were designed to afford parties a simple, speedy and efficient relief in a most worthy class of cases, and this power should be exercised by courts in the same liberal spirit in which they were designed.—*Griswold Linseed Oil Co. v. Lee*, S. Dak., 47 N. W. Rep. 955.

116. JUDGMENT—Lien.—Where, one being told by an attorney who has in his charge certain judment liens, that all of said judgments were paid but one, pays that, completes his purchase and takes his deed, relying upon such information, his title will not be divided in favor of such attorney by a subsequent execution sale on a judgment which was not in fact paid.—*Eickelberg v. Soper*, S. Dak., 47 N. W. Rep. 953.

117. JUDGMENT—Merger.—The effect of a certain judgment *held* to be merely to reinstate the lien of a mortgage, and not to discharge the mortgage debt, or to merge it in the judgment.—*Elmquist v. Markoe*, Minn., 47 N. W. Rep. 970.

118. JUDGMENT—Presumptions.—Where a judgment remains unsatisfied, suit may be brought, and a recovery had upon the judgment.—*Gapen v. Bretternitz*, Neb., 47 N. W. Rep. 918.

119. JUSTICE'S JUDGMENT.—Code Iowa, § 3552, provides that, where a verdict is rendered by a jury in a justice's court, the justice shall enter judgment thereon "forthwith:" *Held*, a judgment entered by a justice more than 90 days after the return of the verdict was void for want of jurisdiction.—*Tomlinson v. Litze*, Iowa, 47 N. W. Rep. 2015.

120. LACHES—What Constitutes.—Facts under which it was held that the delay in filing bill to set aside conveyances by means of which property was fraudulently obtained constituted laches.—*Mackall v. Casilear*, U. S. S. C., 11 S. C. Rep. 178.

121. LANDLORD AND TENANT—Summary Proceeding.—Under Rev. St. Wis. § 2636, a justice acquires no jurisdiction by a complaint which fails to state either of the facts necessary therein, although it does allege that demand was made in writing for unpaid rent and that defendant failed to comply therewith.—*Conley v. Conley*, Wis., 47 N. W. Rep. 950.

122. LANDLORD AND TENANT—Tenant at Will.— Where one verbally agrees to lease a room for a year provided he himself obtains a renewal of his ground lease, and under this agreement the tenant takes possession, but the lease is never executed nor tendered to him, he is a tenant at will only, not a tenant from year to year, and may abandon the possession without giving six months' notice of his intention to vacate.—*Childers v. Lee*, N. Mex., 25 Pac. Rep. 781.

123. LIBEL—Probable Cause—Malice.—Where an alleged libel charges an indictable offense, the presumption of innocence of the party so charged is *prima facie* evidence of falsity and want of probable cause, and therefore of malice, and is sufficient to put the defendant to proof of the facts to support his claim of privilege.—*Conroy v. Pittsburgh Times*, Penn., 21 Atl. Rep. 154.

124. LIFE INSURANCE—Beneficiaries—Legal Representatives.—Where the aged and heavily indebted father of a family, dependent on him for support, takes a

life insurance policy payable to his "legal representatives," it is payable to his widow and children, as it will be presumed that, under the circumstances, he intended to describe them by that term, rather than his executors or administrators.—*Griswold v. Sawyer*, N. Y., 26 N. E. Rep. 464.

125. LIMITATIONS—Personal Injuries.—Code Miss. 1880, § 2673, requiring actions for assault, battery, maiming, false imprisonment, malicious arrest, etc., to be brought within a year, does not apply to actions against companies for personal injuries caused by their negligence.—*Bell v. Kansas City, etc. R. Co.*, Miss., 8 South. Rep. 509.

126. MALICIOUS PROSECUTION — Costs — Attorney's Fees.—Under Code Ga. § 2942, a person who institutes in bad faith an unfounded trover suit is liable, in an action for malicious prosecution, for the counsel fees incurred by plaintiff in defending the trover action.—*Farrar v. Brackett*, Ga., 12 S. E. Rep. 686.

127. MANDAMUS — Judicial Officers.—Under the Kentucky statutes where petitioner applied for *mandamus* to compel a judge of a county court to levy and collect a tax to pay a judgment recovered against the county: *Held*, that it was sufficient answer that respondent had levied the tax and appointed a collector as that exhausted his authority.—*Bass v. Taft*, U. S. S. C., 11 S. C. Rep. 154.

128. MANDAMUS—Supersedeas.—An appeal by the territorial auditor from a peremptory writ of *mandamus* erroneously issued against him commanding him to audit and allow the claims of a sheriff against the territory does not operate as a *supersedeas*. — *Alarid v. Romero*, N. Mex., 25 Pac. Rep. 728.

129. MANDAMUS—To Courts—Review.—Where an inferior tribunal is authorized to use its discretion, and proceeds to exercise such discretion, it cannot be controlled by *mandamus* in judicially determining questions properly presented for its consideration and within its jurisdiction.—*Miller v. County Court of Tucker County*, W. Va., 12 S. E. Rep. 702.

130. MASTER AND SERVANT — Assumption of Risk. — *Held*, that the employee while passing over a car loaded with ore stepped upon a piece which turned under his foot whereby he was injured, is evidence of injury by accident rather than by fault or negligence of the company.—*East Tenn. etc. R. Co. v. Sudduth*, Ga., 12 S. E. Rep. 682.

131. MASTER AND SERVANT—Contributory Negligence. —The failure of a foreman of a gang of sectionmen, who are propelling a hand-car along the track, to send a lookout ahead near a curve to give warning of a train, of whose approach all are chargeable with knowledge, if negligence, is participated in by the sectionmen, who voluntarily and without express orders from the foreman, remain on the car.—*Hammond v. Chicago, etc. Ry. Co.*, Mich., 47 N. W. Rep. 965.

132. MASTER AND SERVANT—Discharge of Employee.—*Held*, that actions for damages against a railroad company would not lie where plaintiff, an employee in the ticket department was suspended under circumstances which cast suspicion upon his integrity and where defamatory articles were published based on information derived from the general superintendent.—*Henry v. Pittsburg, etc. R. Co.*, Pa., 21 Atl. Rep. 157.

133. MASTER AND SERVANT—Knowledge of Defects—Complaint.—Where a brakeman in a switching-yard states to the yard master, whose duty it is to report needed repairs to the train-master, that he hates to work with the engine in use, because there are no run-boards around the pilot, and the yard-master replies that the engine will not be used long, it is proper to submit to the jury the question whether or not the brakeman complained of the defective engine, and was promised that a suitable one would be provided.—*Purt v. Chicago, etc. Ry. Co.*, Iowa, 47 N. W. Rep. 1017.

134. MASTER AND SERVANT—Negligence of Vice-principal.—Where a principal provided suitable material in sufficient quantity for the construction of necessary scaffolding, he is not liable for the consequences of an error in judgment of the foreman in the selection and use of a particular piece which proved to be defective —*Ross v. Walker*. Penn., 21 Atl. Rep. 157.

135. MASTER AND SERVANT—Risks of Employment.—*Held*, upon the facts that the employee herein assumed the risks of his employment and was not excused because of a promise by the master to repair.—*Lewis v. New York Cent. R. Co.*, Mass., 26 N. E. Rep. 431.

136. MASTER AND SERVANT.—With respect to the care a master or employer must exercise in the selection of servants and in the use of machinery and appliances in his business.—*Holland v. Tenn. Coal, etc. R. Co.*, Ala., 8 South. Rep. 524.

137. MECHANICS' LIENS—Affidavit.—A departure from the form prescribed for affidavits in § 18, ch. 90, Gen. St. 1878, relating to mechanics' and material-men's liens, is not necessarily fatal, but all matters of substance found in the form must appear.—*St. Paul & M. Pressed Brick Co. v. Stout*, Minn., 47 N. W. Rep. 974.

138. MECHANIC'S LIEN — Foreclosure.— Under Code Civil Proc. Cal. §§ 1183, 1184, a complaint to foreclose a lien for materials furnished is sufficient when it avers that due notice was given the owner of the amount and value of the materials to be furnished the contractors. —*Russ Lumber & Mill Co. v. Garrettson*, Cal., 25 Pac. Rep 747.

139. MECHANIC'S LIEN — Leasehold. — Under Act Pa. June 17, 1887, authorizing the filing of mechanic's lien on leaseholds, notice must precede the performance of the work to sustain the lien.—*Stranick v. Munhall*, Pa., 21 Atl. Rep. 151.

140. MECHANIC'S LIENS—Pleading.—One H brought an action to foreclose a mechanic's lien, and there being a number of small liens against the same property, they were assigned to him, and an action brought thereon in his own name: *Held*, that as the assignment of such liens was in the interest of economy, an order of the court continuing such lien in force, and permitting the plaintiff to acquire the beneficial interest as well as the legal title, would be sustained.—*Hoagland v. Van Etten*, Neb , 47 N. W. Rep. 920.

141. MECHANIC'S LIEN—Statement.—Where the statement for a mechanic's lien shows that claimants are dealers in building material, and that the materials charged consisted of lumber used for building a house, and the account is made out in the usual manner of bills of lumber, it is sufficient.—*Wetmore v. Marsh*, Iowa, 47 N. W. Rep. 1021.

142. MINING LOCATION.—The fact that a mining locator has failed for one year to perform the annual labor required by Act Cong. May 10, 1872, does not work a forfeiture of the claim, where he in good faith resumes the work before a new location is made by others.—*Lacey v. Woodward*, N. Mex., 25 Pac. Rep. 785.

143. MORTGAGES — Homestead. — Where the senior mortgagee of a homestead begins foreclosure, and the mortgagee files a cross-bill, upon which a degree foreclosing both mortgages is rendered, providing that special executions may issue to either mortgagee, sale under a special execution issued by the senior mortgagee does not exhaust the junior mortgagee's right to special execution.—*Berans v. Dewey*, Iowa, 47 N. W. Rep. 1009.

144. MORTGAGES—Sale under Power.—A sale under a power in a deed of trust is not void because the trustee was the real owner of the note secured when the deed of trust was executed; nor can it be set aside because the trustee, on default in payment of the interest for the collection of which he held the note, advertised the land for sale without special instructions from the holder, to whom the note had been transferred when the latter ratified his act before the sale.—*Cassedy v. Wallace*, Mo., 15 S. W. Rep. 138.

145. MORTGAGE FORECLOSURE—Default in Interest.—Where a note secured by mortgage declares that, on failure to pay the annual interest when due, the whole sum of principal and interest shall become immediately

due and payable at the option of the holder, demand after default is not necessary to support an action for the entire sum. Bringing the suit to foreclosure is sufficient demand.—*Hewett v. Dean*, Cal., 25 Pac. Rep. 753.

146. MORTGAGE FORECLOSURE—Redemption.— Where the grantee of the mortgagor redeems the land from foreclosure sale, the lien of a junior mortgagee, who has not redeemed, is divested, and the grantor can maintain a bill to quiet title against such junior mortgagee.—*Moody v. Funk*, Iowa, 47 N. W. Rep. 1008.

147. MORTGAGES ON GROWING CROPS— Warehouse.— The lien of a mortgage on growing crops is not lost by the mortgagor's storing the property in a warehouse, under an agreement with the mortgagee that it should be stored in the latter's name; and the action of the warehouseman in issuing the receipt in the name of the mortgagor, instead of the mortgagee, as he had been directed to do, does not entitle the mortgagor's assignee in insolvency to a preference over the mortgagee.— *Campodonico v. Oregon Imp. Co.*, Cal., 25 Pac. Rep. 763.

148. MUNICIPAL CORPORATION—Assessments. — Under Act Cal. March 18, 1885, § 11, a contractor who does not appeal from the act of the superintendent of streets in making an assessment, which includes the cost of work called for by the specifications, but not authorized by the "resolution of intention," cannot compel him by *mandamus* to make another assessment.—*Frick v. Morford*, Cal., 25 Pac. Rep. 761.

149. MUNICIPAL CORPORATION—Defective Streets—Negligence.—If a person make an excavation so near the line of a public street that one lawfully passing along said street may accidentally fall into it, it is the duty of the person making such excavation to errect barriers as a protection against such accidents.—*City of South Omaha v. Cunningham*, Neb., 47 N. W. Rep. 930.

150. MUNICIPAL CORPORATION—Electric Light Companies.—Even if Pub. St. Mass. Chap. 109, Secs. 2 and 3, imperatively require the board of aldermen to grant some location for the posts of telegraph lines, yet Acts 1883 chap. 221, and acts 1889 chap. 398, which extends the provision of these two sections to electric light companies "so far as applicable" cannot receive such an imperative construction in view of the local character of the companies of the danger arising from their lines to travelers on the streets and of the other demands for the use of the streets.—*Suburban Light, etc. Co. v. Board*, Mass., 26 N. E. Rep. 447.

151. MUNICIPAL CORPORATIONS — Public Improvements — Lowest Bid. — Under Act Pa. May 23, 1874, § 6, the director of public works of the city, who in his official capacity advertises for bids for specified public improvements, reserving to himself "the right to accept or reject any or all bids, as he may deem best for the interests of the city," may reject all the bids made, and award the work to the lowest bid made in response to a second advertisement, without incurring personal liability to the lowest bidder under the first advertisement.—*American Artificial Stone Pavement Co. v. Wagner*, Penn., 21 Atl. Rep. 160.

152. MUNICIPAL CORPORATIONS — Streets—Trespass.— A city in whom is vested the fee of its streets in trust for the public has a right of action against one who mines coal underlying such street without its consent for the full value of the coal so mined, though the removal of the coal does not affect the use of the land for streets.—*Union Coal Co. v. City of La Salle*, Ill., 26 N. E. Rep. 506.

153. MUNICIPAL CORPORATION — Taxation. — Farming land situated within the corporate limits of a city but entirely without the platted and settled portions thereof, cannot be taxed for municipal purposes when the owner will derive no benefit from the expenditure of the taxes either by the extension of the platted limits or of streets or other improvements in that direction. —*Ellison v. Lindford*, Utah, 25 Pac. Rep. 742.

154. MUNICIPAL CORPORATION—Under Const. Ill. § 18, which provides that "all official writing and the executive legislative and judicial proceedings shall be published in no other than the English language a city cannot publish its ordinances at the public expense in a German newspaper.—*City of Chicago v. McCoy*, Ill., 26 N. E. Rep. 363.

155. MUNICIPAL POLICE—Life Insurance Fund.—Under Act. Cal. April 1, 1878, authorizing a retention of a certain sum per month from the pay of each police officer to be paid into the police life fund the police officer has no vested property right in such fund and on his discharge from the force he is not entitled to the return of the amount contributed by him —*Clark v. Reis*, Cal., 25 Pac. Rep. 759.

156. MUTUAL BENEFIT INSURANCE—Beneficiaries.—The member of a beneficial society, within a few hours of his death, sent the certificate of insurance to the president of his lodge with the request that it should be transferred to new beneficiaries: *Held*, upon the suit of the original beneficiary, that an indorsement of the certificate made by the president of the lodge, in accordance with the verbal message of the owner of the certificate, was sufficient to effect a change of beneficiaries.—*Schmidt v. Iowa Knights of Pythias Ins. Ass'n*, Iowa, 47 N. W. Rep. 1032.

157. MUTUAL BENEFIT SOCIETY.—Where the by laws of a society provided for a change of beneficiary and that in case of the death of all the beneficiaries the money shall be paid to the insurer's heirs, the insured's administratrix can maintain an action on a certificate even though the beneficiary designated was not eligible as such under the laws of the association.—*Burns v. Grand Lodge*, Mass., 26 N. E. Rep. 443.

158. MUTUAL BENEFIT SOCIETY — Forfeiture. — *Held*, upon the facts and under the by-laws a change of occupation as herein did not work a forfeiture of membership.—*Hobbs v. Iowa Mut. Ben. Assoc.*, Iowa, 47 N. W. Rep. 983.

159. NEGLIGENCE—Gas-wells.— Where a natural gas company drills its well, with full knowledge of the geological formation, and neglects to exercise reasonable care to avoid the destruction of the wells of fresh water in the neighborhood, by the mingling of salt water with the fresh streams, which is plainly to be anticipated, but may be avoided by reasonable precautions, and, as a result of such negligence, a well is destroyed, the owner thereof has a right of action against the company for damages.—*Collins v. Chartiers Valley Gas Co*, Penn., 21 Atl. Rep. 147.

160. NEGLIGENCE—Presumptions.—As a general rule, the proof of the occurrence of an accident does not raise a presumption of negligence.—*Bahr v. Lombard*, N. J., 21 Atl. Rep. 190.

161. NEGOTIABLE INSTRUMENT—Consideration.— In an action upon a note given to prevent legal proceedings for debauching the infant unmarried daughter of plaintiff, whereby she became pregnant and gave birth to an illegitimate child, a defense that the motive in making such note was to conceal defendant's conduct from his family and church, and the facts having become public, a failure of consideration intervened, is insufficient.—*Swanson v. Griffin*, Miss., 8 South. Rep. 511.

162. NEGOTIABLE INSTRUMENT — Innocent Holders—Parties.—In an action to enforce a purchase-money note which provides that it is a lien on the land, and which was indorsed without recourse by the vendor, and by his indorsee transferred before maturity to plaintiffs as security for a pre-existing debt, the indorsee is not a necessary party.—*Brown v. Thompson*, Tex., 15 S. W. Rep. 168.

163. NUISANCE—What Constitutes.—Where defendants are charged with maintaining a public and common nuisance by operating an oil refinery, in a city, the character of the location, when the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, are proper

matters for consideration by the jury in determining whether it is a public nuisance.—*Commonwealth v. Miller*, Penn., 21 Atl. Rep. 138.

164. OFFICER—Taking Illegal Fees.—Where a clerk of the district court takes fees in excess of that limited by law, he is liable to the party injured for the penalty provided by § 34, ch. 28, Comp. St.—*Lydick v. Palmquist*, Neb., 47 N. W. Rep. 918.

165. PARTITION—Parties.—Where a widow is in possession of lands under her dower right, such estate cannot be subjected to partition even at her request; and in the partition of the residue of her intestate's lands she is not a proper party.—*Wood v. Bryant*, Miss., 8 South. Rep. 518.

166. PARTNERSHIP—Accounting.—Where two contract to purchase a boat as joint owners and partners in it and its business, but one fraudulently procures the bill of sale to be made to himself, and then takes sole possession of the boat and excludes his partner, who has paid part of the purchase price, from all participation in the business and profits, the ousted partner can sue in equity to compel the conveyance to him of a half interest in the boat, and for an accounting.—*Zimmerman v. Chambers*, Wis., 47 N. W. Rep. 947.

167. PARTNERSHIP—Intoxicating Liquors.—It is no defense to an action by one partner against another for conversion of partnership property that the firm were unlawfully engaged in selling intoxicating liquors.—*Howe v. Jolly*, Miss., 8 South. Rep. 513.

168. PAYMENT.—A plea that a note given by a client to his attorney was paid is sustained by proof that the attorney retained the amount due on the note out of money collected by him in payment of a judgment which he had recovered for the client.—*Braden v. Lemmon*, Ind., 26 N. E. Rep. 476.

169. PLEADING — Answer — Denial. — Plaintiff alleged that between November 9, 1889, and February 6, 1890, he sold and delivered to defendant coal of the "kinds and amounts specified, to-wit: 88,700 pounds of lump coal." Defendant averred, "that it is not true that plaintiff, between" said dates, "sold and delivered to defendant 88,700 pounds of lump coal," etc; and therefore he denies, in the same words, plaintiff's allegations: *Held*, that this was a negative pregnant, and not a good denial, under Comp. Laws Utah 1888, § 3226.—*Rock Springs Coal Co. v. Salt Lake Sanitarium Ass'n*, Utah, 25 Pac. Rep. 742.

170. PLEADING—Evidence of Payment.—Where, in a suit on a note, defendants, pleading payment, aver that a stock of goods has been delivered to plaintiff in satisfaction thereof, the agreement under which the property was so taken, even if in writing, is not one on which an indebtedness is founded, within Code Iowa, § 2648.—*National State Bank v. Delahaye*, Iowa, 47 N. W. Rep. 999.

171. PRINCIPAL AND AGENT.—It is upon payment of a debt contracted by an agent for the benefit of a principal that the right of action accrues in favor of the agent against the principal, and not for some future contingent liability, or payment which the former may be compelled to make.—*Porter v. Booth*, S. Dak., 47 N. W. Rep. 960.

172. PRINCIPAL AND AGENT—Authority.—A resolution of the board of directors of a flume company authorizing its superintendent to "enter into negotiations with contractors and others for work on the line of the flume, in his discretion, subject to the approval of the board," does not empower him to employ a broker to find a suitable contractor, in the absence of evidence that such a course is necessary and usual in the ordinary course of business.—*Harris v. San Diego Flume Co.*, Cal., 25 Pac. Rep. 758.

173. PRINCIPAL AND AGENT—Banks—Disregard of Instructions.—Under the facts *held* that defendant being plaintiff's agent and dealing with property known to be his, is liable for the loss resulting from its failure to follow his instructions.—*Bank v. Cooper*, U. S. S. C., 11 S. C. Rep. 160.

174. PRINCIPAL AND AGENT—Commissions.—*Held*, upon the facts that the agent had failed in his duty to his principal and therefore was not entitled to the agreed commission.—*Wordsworth v. Adams*, U. S. S. C., 11 S. C. Rep. 303.

175. PRINCIPAL AND AGENT—Modification of Contract.—A general agent for the sale of a non-resident's lands and the collection of the payments has authority to make a parol contract with a purchaser of the principal's land, whereby the terms of the original contract are modified.—*Francis v. Litchfield*, Iowa, 47 N. W. Rep. 998.

176. PRINCIPAL AND SURETY.—A bond conditioned that the principal shall faithfully perform the duties of the office of book-keeper, "to which he has been appointed," and shall faithfully account for "all moneys which may come into his hands as the agent, employee, or officer" of his employer, does not bind the surety for the principal's default as cashier, an office to which he was subsequently appointed.—*American District Tel. Co. v. Lenning*, Penn., 21 Atl. Rep. 162.

177. PRINCIPAL AND SURETY — Attachment.— Sureties on an attachment bond are within the meaning of Pub. St. Mass. ch. 157, §§ 26, 129, which provide that if an insolvent debtor is liable for any debt in consequence of the payment of any sum by a surety of the debtor in any contract, if the payment is made before the making of the first dividend, such debt may be proved and allowed as if it had been due before the first publication.—*Hussey v. Crawford*, Mass., 26 N. E. Rep. 424.

178. PRINCIPAL AND SURETY — Release.—The sureties on the bond of a contractor for the construction of a school-house are not released because the commissioners make an extra allowance to the contractor for work which he had failed to include in estimating his bid, but which was called for by the plans and specifications.—*Moore v. Fountain*, Miss., 8 South. Rep. 509.

179. PRINCIPAL AND SURETY — Release of Surety.—A statement by the payee of a note to the sureties that he will not hold them, but will look to the principal alone, is a release of the sureties; and Code Iowa, §§ 2108, 2109, providing that sureties may serve a written notice requiring the creditor to sue, or to permit the surety to do so, does not apply to such case.—*Wolf v. Madden*, Iowa, 47 N. W. Rep. 981.

180. PROBATE OF WILLS.—The organic act of New Mexico (Act. Cong. Sept. 9, 1850, § 10, 9 St. 449), which declares that the "jurisdiction" of the probate courts shall be "as limited by law," does not put in force the practice and procedure of the common law touching matters of probate, regardless of any statutory provisions of the territory; and, as the common law was not adopted in New Mexico until 1876, and then only to a limited extent, the validity of the practice and procedure on the probate of wills before that time must be determined by the statutory regulations of the territorial assembly.—*Bent v. Thompson*, U. S. S. C., 11 S. C. Rep. 238.

181. PROCESS—Service.—Personal service in Iowa of process in an action pending in New York is insufficient to give jurisdiction of the person of defendant and the judgment in such action is void and is not admissible in evidence in an action between the same parties in Iowa.—*Kelly v. Norwich Union Fire Ins. Co.*, Iowa, 47 N. W. Rep. 986.

182. PROCESS—Service—Foreign Corparations.—Where an action against a foreign corporation, which neither does business nor has a place of business or property in New York, is begun under Code Civil Proc. N. Y. § 432, by service upon a director thereof, found in the State, but not there in any official capacity or in the business of the corporation, the court acquires no jurisdiction.—*Bentlif v. London & Colonial Finance Corp.*, U. S. C. C. (N. Y.), 44 Fed. Rep. 667.

183. PUBLIC LAND — Cutting Timber.— In trover for timber alleged to have been cut on the public land, where the receiver of the United States land-office tes-

tifies that a pre-emptor has paid for the land as required by law, the presumption is that final proof has been made by the pre-emptor, leaving only the naked legal title in the United States; and hence the latter cannot maintain the action, as Comp. Laws N. M. § 1882, requires every action to be prosecuted in the name of the real party in interest. — *United States v. Saucier*, N. Mex., 25 Pac. Rep. 791.

184. PUBLIC LANDS—Cutting Timber.—Where a homesteader, who has never had possession of the land included in his homestead claim, and whose entry has been canceled, buys the land from the government, such purchase does not pass title to timber which he had cut from the land before his purchase, and after he had learned that his homestead entry was invalid.—*United States v. Perkins*, U. S. C. C. (La.), 44 Fed. Rep. 670.

185. PUBLIC LAND—Swamp Lands.—Act Cong. Sept. 28, 1850, granting to the several States all the swamp and overflowed lands within their limits remaining unsold at the date of the act, operated as a present grant, subject to a subsequent determination as to what lands were of that character at the date of the act.—*Tubbs v. Wilhoit*, U. S. S. C., 11 S. C. Rep. 279.

186. QUIETING TITLE—Evidence.—In an action to quiet title when plaintiff alleges ownership in fee, which is denied by defendant, plaintiff must prove the title alleged, and this is not done by a quitclaim deed from another, who is not shown to have been in possession when he made the deed.—*Hamilton v. Beaudreau*, Wis., 47 N. W. Rep. 952.

187. QUIETING TITLE—Remedy at Law. — Where the estate or title between conflicting claimants to land is legal in nature, and legal remedy is adequate, and one party has already recovered in ejectment upon his claim, that party cannot sue in equity to remove the cloud from his title arising from such adverse claim.—*Clayton v. Barr*, W. Va., 12 S. E. Rep. 704.

188. RAILROAD COMPANIES—Accidents at Crossings.—A special finding that plaintiff stopped and stood upon the track, where he was struck, that before stopping he looked for approaching cars, and that there was nothing to prevent his seeing the cars which struck him, is not inconsistent with a general verdict for the plaintiff, where the cars that struck him might, when he looked have been on a different track from the one on which he stood.—*Lake Shore, etc. Ry. Co. v. Johnson*, Ill., 26 N. E. Rep. 510.

189. RAILROAD COMPANIES — Accidents at Crossing.—The omission of a railroad company to have the headlight on its engine lighted at about dusk will not warrant a recovery for the death of one run over by the engine at a crossing, where the engine and cars, as well as the reflection of the lights from the car windows, were distinctly visible to persons near the crossing.—*Daniels v. Staten Island Rapid Transit R. Co.*, N. Y., 26 N. E. Rep. 466.

190. RAILROAD COMPANIES — Crossing — Negligence.—Where a traveler stopped, looked, and listened before attempting to cross a track, the question whether he did so at the best place is one of fact for the jury.—*Ellis v. Lake Shore, etc. R. Co.*, Penn., 21 Atl. Rep. 140.

191. RAILROAD COMPANIES—Municipal Aid.—In 1871, the Supreme Court of Ohio declared constitutional Act Ohio, May 4, 1871, which authorized the city of Cincinnati to construct and equip a continuous line of railroad: *Held*, that this is not a judicial guaranty of the validity of laws Ohio, 1800, page 157, which authorizes a township which is a *quasi* corporation to construct through its territory a few miles of railroad forming part of a line intending to be ultimately owned and operated by private capital, and a purchaser of bonds issued by the township under the act of 1880 takes them subject to the risk of having the act declared unconstitutional.—*Pleasant Tp. v. Ætna Life Ins. Co.*, U. S. S. C., 11 S. C. Rep. 215.

192. RAILROAD COMPANIES—Negligence.—In an action under St. Mass. 1887, ch. 270, making railroad companies liable in certain cases for injuries caused by the negligence of any employee "in charge of any locomotive engine or train," it is a question for the jury whether it is negligence, in a large freight-yard where trains are made up at night, to leave a car standing so near the intersection of two tracks as to allow a space of less than five inches between it and a car passing on the adjoining track.—*Dacey v. Old Colony R. Co.*, Mass., 26 N. E. Rep. 437.

193. RAILROAD COMPANIES—Stock Killed.—In an action under Code Iowa, § 1289, to recover double damages for stock killed upon a railway, where it appears that at the time of the injury the railway company was in the hands of a receiver, who was operating the road, it is error to render a judgment against the railway company for the damages, as the statute applies only to persons operating the road.—*Brockert v. Central Iowa Ry. Co.*, Iowa, 47 N. W. Rep. 1026.

194. RAILROAD CONSTRUCTION — Contract. — Where a contract to grade a railroad provides that the work is to be done under the supervision of the chief engineer and his assistant, whose estimate of quantities is to be "final and conclusive upon the parties," and that the contractor shall receive monthly payments on the certificate of the engineer "for work done," the railroad company cannot, after accepting the work and the last monthly estimate of the engineer, have the work reestimated by another subordinate engineer.—*Chicago, etc. R. Co. v. Price*, U. S. S. C., 11 S. C. Rep. 290.

195. RECEIVERS—Sales — Assumption of Liabilities.—Where a railroad which has been in the hands of a receiver appointed by the circuit court is sold, and the purchaser, as a part of the consideration, covenants to discharge all existing debts and liabilities of the receivership, it is the duty of such court to protect the purchaser against all demands which are not just and proper demands against the receiver, and to that end to require all such demands to be presented to it for allowance.—*Jesup v. Wabash, etc. Ry. Co.*, U. S. C. C. (Ohio), 44 Fed. Rep. 663.

196. RECORD OF CASE—Waiver.—Under section 444 of the Code, it is the duty of the clerk to make a complete record of a case as soon as it is finally determined, unless such record, or some part thereof, be duly waived.—*Colonial, etc. Mortg. Co. v. Foutch*, Neb., 47 N. W. Rep. 929.

197. RELIGIOUS SOCIETIES—Right to Sue—Nuisance.—A properly recorded certificate of incorporation of a church in Washington, D. C., stated that the signers had been duly elected trustees, without giving the date of their election, or the term of office, or supporting the same by affidavit, as required by Act Cong. May 5, 1870, but the church had executed deeds and releases of land as a corporation, and under its corporate name had sued and recovered judgment against defendant in a former action without objection being made to its capacity to sue: *Held*, that it was a corporation *de facto* if not *de jure*, and could sue to recover damages for a nuisance.—*Baltimore, etc. R. Co. v. Fifth Baptist Church of Washington*, U. S. S. C., 11 S. C. Rep. 185.

198. REMAINDER.—It is the present capacity of taking effect in possession if the possession were to become vacant, not the certainty that it will become vacant while the remainder continues which distinguishes a vested from a contingent remainder.—*Schuyler v. Hanney*, Neb., 47 N. W. Rep. 932.

199. REPLEVIN—Counterclaim.—*Held*, that the cross-petition herein was a counterclaim within Code Iowa, § 3226, providing that in actions for the recovery of specific personal property no counterclaim shall be allowed and a demurrer thereto was properly sustained.—*Muir v. Miller*, Iowa, 47 N. W. Rep. 1011.

200. RESCISSION — Contract — Laches. — In suit by a vendee to set aside a sale of land on the ground of fraud and misrepresentation it was held that in view of the facts he was guilty of laches in not rescinding the contract as soon as he could ascertain the character of the land.—*Greenwood v. Fenn*, Ill., 26 N. E. Rep. 487.

201. SAVINGS BANKS—Orders—Negotiability.—An order on a savings bank bore upon its face memoranda showing that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations in force between it and the depositor, requiring previous notice of depositor's intention to draw upon the fund, return of the notice ticket, with the order to pay, and presentation of the deposit-book, before payment could be required: *Held*, that the order was non-negotiable.—*Iron City Nat. Bank v. McCord*, Penn., 21 Atl. Rep. 142.

202. SCHOOL-DISTRICTS — Boundaries. — Under Code Iowa, § 1809, in an action by an independent district for *mandamus* to compel the board of directors of a district township to take action on its proposition to change the boundaries, that the fact that the independent district is co-extensive with a village does deprive it of the benefits of the act.—*Independent District of Lynnville v. District Tp. of Lynn Grove*, Iowa, 47 N. W. Rep. 1030.

203. SCHOOLS — Contracts. — A contract engaging plaintiff as a teacher when signed by the teacher and one of the trustees when the board was not in session and afterwards approved at a special session of the board and there signed by another trustee is binding on the corporation.—*School Town v. Powner*, Ind., 26 N. E. Rep. 484.

204. SHIPPING—Vessel on Fire.—Where a ship loaded with cotton takes fire in port just before clearing, and a shipping firm is employed by the master to take charge of her, to extinguish the fire, unload the cargo, and do everything else necessary for the protection of the vessel and cargo, such employment is not a contract of agency, but one of hiring, and the owners cannot discharge the firm without cause.—*Horan v. Strachan*, Ga., 12 S. E. Rep. 678.

205. STOCK-KILLING—Unliquidated Claim.—In an action for double damages, under Code Iowa, § 1289, for stock killed upon a railroad through neglect to fence, where payment therefor is not made in 30 days, where the owner received in settlement of his claim a due-bill for the agreed value of the stock, but which was not paid within the 30 days, the damages being unliquidated, the settlement was on good consideration, and there can be no recovery, in the absence of any showing of fraud or mistake.—*Shaw v. Chicago, R. I. & P. Ry. Co.*, Iowa, 47 N. W. Rep. 1004.

206. STREET RAILWAYS—Construction—Abutters.—In Civil Code Cal. § 498, requiring street-railway tracks to be placed as "nearly as possible" in the middle of the street, the words "as nearly as possible" are equivalent to "as nearly as practicable."—*Finch v. Riverside & A. Ry. Co.*, Cal., 25 Pac. Rep. 765.

207. SUBROGATION—Limitations—Equity.—The equitable right of a surety who has paid a judgment rendered against his principal and himself to be subrogated to the rights of the judgment creditor cannot be enforced after his right of action against his principal on the latter's implied promise to reimburse him has become barred by the statute of limitations.—*Junker v. Rush*, Ill., 26 N. E. Rep. 499.

208. TAXATION—Corporations—Capital Stock.—Under Act June 1, 1889, §§ 1, 21 (P. L. 420), the capital stock of corporations is first to be taxed at its appraised value, and then their mortgages not included in the appraised value of the stock are to be taxed under section 1.—*Pennsylvania Co. for Insurance v. Board of Revision*, Pa., 21 Atl. Rep. 163.

209. TAXATION—Liens.—There is no lien on real estate for taxes, except by force of statute, and a statute creating such lien must be strictly construed. Such statutory lien cannot be enlarged by construction.—*Miller v. Anderson*, S. Dak., 47 N. W. Rep. 957.

210. TAXATION OF NATIONAL BANKS.—The shares of stock of a national bank are taxable to the owners, and the bank is not liable primarily, or as the agent of the shareholders, under the act of congress, or the revenue laws of this territory, for the payment of a tax levied upon such shares.—*Albuquerque Nat. Bank v. Perea*, N. Mex., 25 Pac. Rep. 776.

211. TAX-TITLES—Selling State Lands.—Under Act Miss. April 5, 1872, to quiet tax-titles, requiring the circuit clerks to advertise lands sold to the State for taxes prior to October 1, 1871, and providing that the "owner" may "redeem" the same within twelve months, no title is conveyed by a deed from the clerk to one claiming ownership by virtue of a void deed from the levee commissioner.—*Ricks v. Baskett*, Miss., 8 South. Rep. 514.

212. TAX-TITLES—Validity.—Under Rev. St. Ill. ch. 120, § 216, which provides that notice shall be served upon the person in whose name the land was taxed, service on one member of a firm, where the land is assessed to the firm, is insufficient to sustain a tax-deed.—*Hughes v. Carne*, Ill., 26 N. E. Rep. 517.

213. TELEGRAM—Failure to Deliver.—Mere delivery of a message written on a leaf torn from a blank book, without any word spoken either by plaintiff's messenger or the company's operator concerning the sending of the message, and an absence of any payment made or tendered of the price for transmission, is insufficient to create a liability against the company for failure to send such message.—*Western Union Tel. Co. v. Liddell*, Miss., 8 South. Rep. 510.

214. TERRITORIAL LEGISLATURE—Powers.—Under Organic Act Okla. Ter. § 6, it is competent for the legislature to continue in force, after the adjournment of the first legislature, the Criminal Code of Nebraska, extended to the territory by the organic act, § 11, until the adjournment of the first session of the legislature.—*Ex parte Larkins*, Okla., 25 Pac. Rep. 745.

215. TOLL-ROADS — Evading Payment.—Demanding a written receipt, and threatening litigation, and thereby inducing a toll-gate keeper to allow one to pass without paying toll, is not an offense under Gen. St. Ky. ch. 110, § 10, imposing a penalty for defrauding by going around a toll-gate, or otherwise evading the payment of toll.—*Rives v. Wood*, Ky., 15 S. W. Rep. 131.

216. TOWNS—Defective Bridges.—The fact that a village has no funds with which to repair a public bridge forming part of one of its streets does not relieve it from liability for accidents to travelers caused by the condition of the bridge, since it might close the bridge if it was unsafe.—*Carney v. Village of Marseilles*, Ill., 26 N. E. Rep. 491.

217. TOWNS—Liabilities—Torts.—A town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein by town authority for a violation of its ordinances, though such fire was attributable to the wrongful act or negligence of the officers or agents of the town.—*Brown's Adm'r v. Town of Guyandotte*, W. Va., 12 S. E. Rep. 707.

218 TOWNS—Public Streets.—An incorporated town has power under Code Iowa, § 456, authorizing it to "provide for the measuring or weighing of hay, coal," etc., to grant to individual dealers the right to set scales in the public street in front of their places of business in such a way as not to be an obstruction to travel.—*Incorporated Town of Spencer v. Andrew*, Iowa, 47 N. W. Rep. 1007.

219. TOWNSHIP—Liabilities.—The trustees of a township are not personally liable for the non-payment of a town order executed by them as such trustees, and given in payment for a machine purchased by them for the use of the township.—*Willett v. Young*, Iowa, 47 N. W. Rep. 990.

220. TRESPASS—Who Liable.—Under Act Pa. March 29, 1824, where the owner of timber land procures the running of a line so as to include other land than his own, points it out as the true boundary, sells the timber thereon, and receives payment therefor, he is liable, with his vendee, to the owner thereof as a trespasser.—*McCloskey v. Ryder*, Pa., 21 Atl. Rep. 148.

221. TRESPASS TO TRY TITLE.—Under an averment, in trespass to try title, that the plaintiff is the sole owner

of the land, he may recover an undivided interest, and, if he prays partition, and the necessary parties are before the court, it should be awarded.—*Murrell v. Wright*, Tex., 15 S. W. Rep. 156.

222. TRESPASS TO TRY TITLE—Evidence.—In trespass to try title, where plaintiff and defendant claim through a common source, defendant cannot question the validity of a link in the title prior to its vesting in the common source.—*Evans v. Foster*, Tex., 15 S. W. Rep. 170.

223. TRUST—Declaration—Validity.—Under 2 Rev. St. N. Y. p. 134, § 67, providing that no trust shall be created unless by operation of law, or by deed or conveyance in writing, subscribed by the party creating it, but that a declaration of trust may be proved by any writing subscribed by the party declaring it, an undelivered but recorded instrument, by which the owner of land declares that it is to be charged with the maintenance of another, creates a valid trust though there is no consideration for it.—*McArthur v. Gordon*, N. Y., 26 N. E. Rep. 459.

224. TRUST—For Grantor's Benefit—Validity.—An irrevocable trust created in her own property by the grantor, an unmarried woman, for her own benefit, without liability for debts or engagements, but with power to dispose of the trust property at death, is void as to creditors, and they may subject the income to their claims.—*Ghormley v. Smith*, Pa., 21 Atl. Rep. 135.

225. TRUST TO PAY DEBTS—Garnishment.—Where a person to whom chattels and credits have been transferred to realize on them, and pay certain debts of the grantors, and turn over the surplus, if any, to them, is summoned as garnishee by plaintiff's creditors, whose claim is unsecured by the transfer, plaintiffs are entitled to have their claims paid out of any surplus that may remain.—*Carter v. Bush*, Tex., 15 S. W. Rep. 167.

226. TRUSTEES—Powers.—As a general rule the trustee's authority over trust property is defined and limited by the instrument creating the trust, and he should be guided strictly by its provisions.—*Atkinson v. Beckett*, W. Va., 12 S. E. Repp. 717.

227. TRUSTS—Will.—Under Rev. St. Ill. ch. 59, § 9, which makes void all trusts in land, except resulting, implied, and constructive trusts, unless the trust is declared by some writing signed by the trustee, or by his last will, land conveyed by a son to his mother on an oral agreement to hold it for life and then divide it between said son and his sisters becomes the absolute property of the mother.—*Champlin v. Champlin*, Ill., 26 N. E. Rep. 526.

228. UNDUE INFLUENCE—Deed.—Facts held sufficient to justify the setting aside of the conveyance notwithstanding the witnesses testified that complainant fully comprehended the transactions and had uttered expressions of gratitude towards defendant.—*Chase v. Hubbard*, Mass., 26 N. E. Rep. 433.

229. USURY—Evidence.—In an action on a note given by the payee in renewal of another note with which he was not connected, the payee may show, as a defense, that he agreed to pay illegal interest on the renewal note, though the original note was not tainted with usury, as Code Iowa, § 2080, prohibits the taking of illegal interest on "any contract."—*Heffner v. Brownell*, Iowa, 47 N. W. Rep. 979.

230. VENDOR AND VENDEE—Rescission of Contract.—Where, on the day fixed for consummating a sale of land, the vendor has made arrangements with the owner and the mortgagee of the land to convey and release, so that he is ready, able, and willing to fulfill the contract on his part, and he tenders such performance, but the vendee refuses to buy, on the alleged ground of deficiency in the quantity of the land, the vendor has a right to rescind the contract.—*Lane v. Lesser*, Ill., 26 N. E. Rep. 522.

231. WILLS—Construction.—The second clause of a will giving a wife all the testator's personalty "to be hers absolutely, to be used by her in any way or manner she may wish for her own comfort and for the comfort and benefit of our two children," gives the wife an absolute estate.—*Wilmoth v. Wilmoth*, W. Va., 12 S. E. Rep. 731.

232. WILLS—Construction.—When a testator devises a farm to his widow "in lieu of dower," until his youngest child comes of age, then to be equally divided between his two children, and, if either die before the youngest comes of age, "then" the share of the deceased to go to the survivor, the widow's interest is not terminated by the death of the youngest child before coming of age, but she is entitled to the farm until the time the child would have come of age.—*McDaniel's Guardian v. McDaniel*, Ky., 15 S. W. Rep. 129.

233. WILL — Construction. — Where a testator bequeathed property in trust to his executor to apply the income to the use of his daughters and provided that from and after the intermarriage of any of them, his executor should hold the securities for certain purposes and made provisions relative to the daughters who should die without issue: *Held*, that the latter provision applied only to those who married and that a daughter who never married took an absolute title to her portion.—*Wellford v. Snyder*, U. S. S. C., 11 S. C. Rep. 183.

234. WILL—Construction.—Where a will provides as follows: "Second. I want all stock to stay on all my farms, and, as fast as can be sold to an advantage, to be sold, and be paid on my debts,"—and it appears that all the personal property does not amount to more than half the debts to be paid, the provision for sale and payment of debts will be construed to apply to the farms, as well as the stock.—*In re Rawling's Estate*, Iowa, 47 N. W. Rep. 992.

235. WILLS—Testamentary Capacity—Insane Delusions.—Where a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity. But where the belief of aversion to the contestant was formed on an apparent cause, leading on his part to a view unjust and erroneous, this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect on the subject.—*Potter v. Jones*, Oreg., 25 Pac. Rep. 769.

236. WILLS—Trusts—Testamentary Power.—A will by which testatrix devised all her land to her husband in trust to use the whole income for his support and maintenance, as well as so much of the *corpus* as might be needed for that purpose, with remainder over for charitable purposes, does not create a valid trust in the husband, as no person can be a trustee for his own benefit; but the husband takes a legal estate in the land for life, under 1 Rev. St. N. Y. p. 727, § 47.—*Rose v. Hatch*, N. Y., 26 N. E. Rep. 467.

237. WITNESS—Competency.—In a proceeding by an administrator to sell the land to his intestate to pay debts, a defendant is competent to testify that the land belonged to his co-defendant, instead of to the estate, since such testimony is against the witness' interest.—*McKay v. Riley*, Ill., 26 N. E. Rep. 525.

238. WITNESS — Competency — Husband and Wife.—Under Code Civil Proc. Utah. § 1156, *Held*, that a subsequent marriage by a married man is not a crime against the lawful wife which can be proved by her evidence of his confessions to her.—*Bassett v. United States*, U. S. S. C., 11 S. C. Rep. 165.

239. WRIT OF ERROR—Parties.—The failure of a sheriff to join in a writ of error sued out by a city from a decree in favor of a tax-payer, enjoining both the city and the sheriff from collecting a tax, is no ground for dismissing the writ, as the sheriff is not a party to any substantial interest involved, but is simply a part of the machinery invoked by the city to enforce the collection of the tax.—*Town of Albuquerque v. Zeiger*, N. Mex., 25 Pac. Rep. 787.